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Supreme Court, U.S.
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CASE NO.

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

LAWRENCE MOORE,
Petitioner,
v.
FISCHBACH & MOORE, INC.,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

Lawrence Moore, *Pro Se*
Box 13543
La Jolla, CA 92039-3543
Ph. (619) 452-9537

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QUESTIONS PRESENTED FOR REVIEW

1. Can a district court distort the facts, law, and issues and try an issue never sued for in order to conceal racketeering by the defense contractor (and International and Local Unions) to evade its federal debarments and defraud the federal government out of hundreds of millions of dollars via a scam which also breached their collective bargaining agreements ("CBAs")?

2. Can the International Union president and Local Union business managers (who conspired with that contractor to evade the debarments) order the Local Union's bylaws changed to hold a one-time non-secret mail-in-vote on a CBA proposal - which contained a provision for awards of attorneys fees against the member who sued them - and disqualify enough ballots until it was passed (after being rejected three times by in-person votes)?

3. Can the district court, the contractor and the joint Union-Contractors Ass'n committee of individual defendants conspire to deny the CBA third party beneficiary access to the courts and extort him to forego appeals by adverse awards of attorneys fees?

LIST OF ALL PARTIES

Plaintiff Lawrence Moore
Defendants:
Local 569 of International Brotherhood of Electrical Workers;
Paul Blackwood;
Richard Smith;
Tom Pridemore;
the International Brotherhood of Electrical Workers;
J.J. Barry;
S.R. McCann;
Richard Robbins;
and Fischbach & Moore, Inc.

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A published appeal opinion is reproduced in Fischbach & Moore, Inc.'s Petition for Writ of Certiorari Case No. 95-485, Appendix, at p. App 1.

STATEMENT OF JURISDICTION

Plaintiff received the Petition for Writ of Certiorari No. 95-485 by Defendant Fischbach & Moore, Inc. in this case on September 25, 1995.

Jurisdiction was proper in the district court under 28 U.S.C. §§ 1331, 1337, and 1343. Circuit Court jurisdiction was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. § 1254 (1) and Rule 12.3 of the Supreme Court Rules.

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STATEMENT OF THE CASE

A. INTRODUCTION

This case started in 1985 when Fischbach & Moore, Inc. ("Fischbach"), the nation's largest electrical defense contractor, was convicted in Tennessee, Virginia, Maryland, Pennsylvania, and Georgia for bid-rigging, tax evasion and mail fraud, and was debarred from all Federal jobs.

Plaintiff sued Fischbach, the International Brotherhood of Electrical Workers ("IBEW"), and Local 569 for breaching their collective bargaining agreement ("CBA") by their conspiracy to transfer Fischbach's employees, tools and equipment to "puppet" corporations created to evade the debarments, but the full extent of their fraud was unknown until the eve of trial in 1991 when the court finally ordered Fischbach to produce some documents in response to Plaintiff's requests served years earlier.[1]

In 1986 Plaintiff ran for business manager of Local 569 against incumbent Paul Blackwood, and against Fischbach's supervisor Smith, who eventually won that ballot stuffing contest in June, 1986 (but the U.S. Department of Labor ("DOL") then sued to set the tainted election aside).

In May, 1986 Fischbach fired Plaintiff to hide their transfers, and Union Defendants began assaulting, battering, suspending, fining and expelling him from the two Unions. He won limited jury verdicts in 1991, but the district court used joint Union-Employers Ass'n ("NECA") committees made up of Defendants to give those jury verdicts back to Fischbach, just as that same biased and partial judge had used such committees to permit Fischbach and the Unions to escape from trial.

He also sued Union Defendants for violating his L.M.R.D.A.

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[1] Under the CBA Local 569 **must** be the only source of workers, but as soon as "puppet" Corbin Dykes Co. signed the CBA on April 30, 1985 Fischbach began transferring its employees directly to Corbin Dykes Co., as part of its plan to evade Federal debarment. Fischbach and Local 569's business managers Smith, Blackwood and Pridemore permitted the transfers until Corbin Dykes was also debarred in 1988.

Title I (29 USC 411) rights during an election and several Union trial boards, and for violating fiduciary duties under LMRDA § 501 by stealing union funds and implementing CBAs arbitrarily (and for LMRDA § 629 illegal discipline).

Smith was paid by Fischbach to campaign for business manager and it gave him extra weeks of Pension Trust credits (violating limits in the CBA) and Fischbach gave him hundreds of Pension Trust credits after he became business manager. Smith's son and daughter-in-law (Union members) transferred from Fischbach to Corbin Dykes Co. without any Local 569 authorization.[2]

From August to October, 1986 a "proposed" CBA with NECA was rejected repeatedly by Local 569 members but was brought back until it passed at a poorly attended meeting. Plaintiff opposed the CBA proposal. In November, 1986 he was assaulted and battered at the Union as Smith looked on.

One Union goon threatened to kill Plaintiff in March, 1987, as Smith's assistant, Godshalk, looked on, and in April, 1987 Smith removed Plaintiff from the out-of-work list, making it impossible for him to get work. Union fines and suspension of Plaintiff for ostensible assault on the person who had attacked him was set aside by the district court and it granted him a TRO against further fines and suspensions.[3]

During 1987 Smith and Local 569's president tried four times to have CBA proposals ratified by the members, but they were rejected because, as in 1986, they reduced the electricians' wages by one third.

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[2] Smith was supported by Fischbach, and incumbent Blackwood was supported by Natkin Group, Inc., a wholly-owned Fischbach entity. Fischbach needed compliant business managers to effect transfers.

[3] Smith and Godshalk contacted all IBEW local unions in California and Nevada where Plaintiff sought work, urging them to blacklist him (they testified they had only "warned" locals about him). Smith's goon followed Plaintiff to see if he was on locals' out-of-work lists, and also drove alongside him on the freeway and pointed a gun at Plaintiff's head, but the driver swerved the car Plaintiff was in off the road.

In October, 1987 Plaintiff proposed a bylaw which would establish procedures for submitting and ratifying all such CBA proposals. It was ruled out of order by IBEW vice-president S.R. McCann without any vote being permitted. In November, 1987 Smith signed the proposed CBA without the collective bargaining unit's approval.

In November, 1987 Plaintiff was re-tried by the Union trial board on the same charges, and was again fined and suspended. The district court refused to act.

In 1988 Smith failed three times to get the 1987 CBA approved by Local members. In August, 1988 IBEW president Barry forced a new Bylaw on members (no vote) providing for a one-time-mail-in-vote on that 1987 CBA. All ballots and ballot envelopes were sequentially numbered, ninety-one of 750 ballots were disqualified by Barry's appointed representative Robbins (who "oversaw" voting), until the CBA passed by 7 votes.

In August, 1988 Plaintiff also submitted a Bylaw proposal providing for recall of elected Local 569 officers. Despite his suspension, bylaws for submission of CBA proposals to members and recall procedure passed, but Barry then vetoed them.[4]

In February, 1989 Local 569 stipulated that the DOL could supervise the next regular election in June, 1989, and the DOL withdrew its lawsuit on the 1986 election. In December, 1989 Plaintiff won D.C. # 85-1719-B at a trial against Local 569 and its officers (but he was then charged by Blackwood and business manager Pridemore - who demoted him to out-of-work list Group Two) before Union trial boards - for suing them).

He was fined $6,000.00 and expelled from the Union. The president of that Local 569 "trial board" was a supervisor for

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[4] Local 569 and IBEW officers were prompted to permit votes by Plaintiff's motions to amend in this case to add LMRDA Titles I and V claims (violations of rights and fiduciary duties) and LMRA § 301 (29 USC 185) breach of contract (the Local Bylaws and IBEW constitution) claims for activities related to trial boards and vetoes of his Bylaws, and for implementing the CBAs.

Dynalectric, Inc., which had been **convicted in Georgia District Court for bid-rigging with Fischbach**. Hand-picked trial board members were similarly biased. He appealed to IBEW president J.J. Barry as per the IBEW constitution, but Barry refused to act.

Plaintiff showed good cause to add breach of fiduciary duty claims against twenty-one Local 569 officers for stealing Union funds to buy golden parachute pensions, and against Local 569 and IBEW officers for violations of Local 569's Bylaws and the IBEW constitution by forcing their CBA proposals on members despite repeated rejections in voting.

But the court then dismissed IBEW president Barry from all LMRDA § 501 (29 USC 501) fiduciary duty claims by holding his veto of proposals for ratifying CBAs and of Bylaws providing for recall of officers - and his forced, tainted one-time-mail-in-vote - violated only § 101 of the LMRDA (29 USC 411) and his dismissal from § 501 also applied to McCann and Robbins.

Plaintiff filed a notice of default against Barry but despite holding that Plaintiff had an LMRDA § 101 claim against Barry the court held it had no *in personam* jurisdiction, and dismissed him from the action "globally" (the ludicrous holdings, affirmed on appeal, allowed Barry to escape from claims for conspiring with Fischbach to evade debarment orders) (Appx., p. 33, 78).[5]

On February 20, 1990 Fischbach's motions for summary judgment and to dismiss on grounds its transfers were permitted (for every reason imaginable) were denied (pp. 34-49, *infra*).[6]

The court called Corbin Dykes Co. a "puppet company" after

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[5] Barry also breached the IBEW constitution and his fiduciary duty by altering Local 569's Bylaws and rigging ballots to approve that 1988 "agreement" despite repeated votes by the third party beneficiaries to reject (as provided for in the IBEW constitution, Art 14, § 5).

The 1988 CBA contract was more abusive than usual such contracts of adhesion because voting was rigged to add a provision for attorney fees against union members/third party beneficiaries who sued the parties for breaching such CBAs.

[6] Fischbach and Corbin Dykes were held to be **separate corporations**

Fischbach and Local 569 admitted conspiring to evade debarment orders as their reasons for breaching the CBA by transfers of employees, expressed amazement at their audacity by admitting it to a Federal judge, but finally concluded "I don't care what they're doing with the Federal Government" (pp. 43-47, 53-55).

The court denied Fischbach summary judgment because they had "urinated in their nest" by having Corbin Dykes separately sign Local 569's CBA (scolding counsel that it was bad advice and unnecessary to effect their ends), and **suggested** the parties take it to a CBA grievance committee (39-47, 48, 51-54).[7]

Months later Local 569 wrote Plaintiff that a CBA grievance "committee" would consider the transfers issue but he refused to have anything to do with the "low-life dealings," and replied that all issues would be litigated in court.[8]

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but, ominously, no order was filed and it was later held to be an **issue of fact**. Local 569 business managers Smith and Pridemore both filed Declarations in support of Fischbach's transfers as did Pridemore and NECA's manager for all of Fischbach's later motions.

[7] Local 569 officers Pridemore and Smith had submitted Declarations supporting the Fischbach motions. Three big local law firms have specialized in defending corrupt contractors in such suits in defense-rich San Diego, the judge was senior partner at the largest before his appointment to the bench, and Fischbach's lawyer was senior partner at one of the others.

[8] No grievance which was submitted to those joint committees was ever produced. They had only used that CBA grievance procedure to approve their breaches of contract. The Unions supported the motions and said Fischbach had filed a "grievance," but Fischbach insisted the Unions filed it. It was heard by the committee years after the suit was filed (despite a CBA seven day time limit on filing grievances), and Plaintiff had alleged in his Complaint such CBA remedies were futile.

Local 569's grievance committee was stocked only with Pridemore (chairman) and officers who were Defendants (Plaintiff got judgments against one in an earlier case), **Dynalectric's San Diego manager**, and NECA's manager (he supported Fischbach's motions in Declarations).

After Fischbach, IBEW, and Local 569 met in *ex post facto* "grievance committees" (with NECA) and approved those illegal transfers, motions to dismiss and for summary judgment - on the grounds committee decisions were *res judicata* on the Plaintiff's breach of contract claims in court - were also denied.[9]

After that hearing, which established Plaintiff could bring breach of contract claims against both Fischbach and the Unions, the court would not state those issues clearly again, finally filed the year-late order on that February, 1990 hearing, amended it within weeks and emulated a greased pig (pp. 50-55, 56-57). Plaintiff had no success getting discovery despite filing three motions to compel against Fischbach, and one was finally granted but had no effect. After a second order to comply with discovery requests, it moved for a protective order and stay of discovery (both were denied) and still refused to do any responses (67-69).

Plaintiff asked the court to find Fischbach and lawyers in contempt for refusing to respond and, after another six months of filing motions they were ordered to show cause why not (67).

Fischbach produced documents which showed **Barry had appeared for it at debarment hearings** and one officer testified that **Barry prevailed on IBEW locals to allow the transfers**, but the court still refused to bring Barry back and the IBEW was also eventually allowed to escape.

Plaintiff filed more supplemental documents attempting to get discovery responses and after two more months documents showing **the national scheme by Unions and Fischbach to evade Federal debarment orders by transfers of its workers to Dynalectric, Inc. and Corbin Dykes Co. between July, 1985**

IBEW "grievance committee" members were appointed by Barry, had no relationship to the CBA or status as arbitrators, and Pridemore was appointed to represent Plaintiff who was not notified of that "hearing."

The court order cited *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) to hold that Fischbach was not protected by joint committees from Plaintiff litigating breaches of contract.

[9] See Appendix, pp. 58-66, *infra*.

and August, 1988 were produced (six days before trial). Trial was postponed.[10]

Plaintiff immediately moved to amend his claims against Fischbach for inflating Smith's Pension account, interfering with the Union election and wrongfully firing him, and to add new claims against the two Unions for their roles, to add Dynalectric, Inc. as a Defendant, and to certify the claims as a class action for others wronged by the transfers, but was denied (Appx., 77-78).

He was also denied leave to add a new claim for conspiracy against Fischbach and the union Defendants, but the court said it would revisit the request during directed verdict motions.[11]

Plaintiff also moved to compel discovery from Local 569 and the IBEW, and moved to find them in contempt for destroying tainted ballots from the August, 1988 CBA mail-in vote pursuant to Barry's orders. They continued to stonewall successfully and the judge would not act on any of Plaintiff's motions (68).

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[10] Arizona corporation Corbin Dykes Co. was owned by Fischbach & Moore Inc., a New York corporation owned by Fischbach Inc., a New York holding company which controlled many entities, including Natkin Group Inc. The payroll for San Diego electricians who had been transferred to Corbin Dykes was $1,776,191.27, but the scam to evade the federal debarments was national in scope.

The federal government finally got wise in 1987 and debarred Corbin Dykes Co. and 14 other companies serving that same Fischbach "puppet" role around the country. The 14 other entities, which were in large Federal markets nationally, were never identified as transferees by Fischbach despite specific, years old requests, but the IBEW said over 10,000 of its electricians were involved.

Some idea of money amounts involved can be gotten from the fact that Dynalectric Inc. and its parent Dynalectron (much, much smaller than the Fischbach group) earned $640.3 million the year prior to its debarment for indictments (on conspiring with Fischbach to rig bids on an EPA waste water treatment plant in Georgia) and one third came from the Department of Defense alone.

[11] Federal courts exclude Union members from racketeering suits on grounds that they bargain collectively and Labor Management Relations Act "pre-emption" applies to RICO claims. *Brennan v. Chestnut*, 973 F.2d 646 (8th Cir 1992) citing *Butchers Union, Local 498 v. S.D.C. Investments Inc.*, 631 F.Supp. 1001 (E.D.Cal. 1986).

Plaintiff also moved for contempt against IBEW and Local 569 lawyers for interfering with a witness who told him that officers, including Pridemore, announced at a meeting that he was expelled from the Union prior to his expulsion.

All motions to compel and find Defendants and their lawyers in contempt were referred to the magistrate and never acted on. Discovery was never completed against any Defendants (69).

On April 1, 1991 the court bifurcated the trial of Fischbach, insisted that Local 569 was liable for breaching "its duty of fair representation in failing to protect its members from Fischbach's transfer policy," and then held that any trial of Local 569 on that issue (rather than breach of contract, which Plaintiff had sued for) was conditioned on the jury first finding that Fischbach had breached the contract. The court also denied summary judgment on CBA ratification issues and other claims (pp. 70-76, *infra*).

On May 28, 1991 Plaintiff's motions to amend to conform to some limited answers to Plaintiff's interrogatories which Fischbach finally provided (admitting its transfers to Corbin Dykes Co. and to Dynalectric, Inc.), and to add Dynalectric, Inc. as a Defendant, (and adding other claims) were denied (on the pretext that Plaintiff had unduly delayed, and despite his three outstanding motions to compel and a like number of requests for contempt findings), his motion to certify the case as a class action was also denied (by misrepresenting necessary criteria were not demonstrated), IBEW president Barry's dismissal was made "globally," the court found "plaintiff's claim is clearly a hybrid [301] action," and Fischbach's renewed motions for reconsideration and motions to dismiss were denied (77-80).[12]

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[12] It clearly **was not** a "hybrid 301" action, as that judge recognized repeatedly in hearings on Fischbach's earlier motions (53-55, *infra*).

Fischbach motions included declarations by Pridemore (chairman of one joint committee and supposed Plaintiff advocate at the IBEW's), NECA's manager (secretary of the first committee - who appointed all

Fischbach's motions were always supported by Local 569 and the IBEW, the trial of Fischbach was **bifurcated** over Plaintiff's vehement objections (see *infra*, at pp. 79-80, 71-72), the court *sua sponte* questioned Plaintiff's standing, and its duplicity and open advocacy for Fischbach was incredible.

B. THE TRIAL

On the first day of trial the court started three days of *in limine* motions, excluded evidence of debarments (and conspiracy to evade them), trial on **Local 569's breach of contract** (the CBA) for allowing the transfers was **bifurcated** from other issues (for removing Plaintiff from its hiring hall out-of-work list, demoting him to Group Two, and fining, suspending, expelling, assaulting and battering him) (Appendix, pp. 81-85).

The court summarily dismissed all claims against the IBEW, (including those related to Barry's veto of the Bylaw amendments which articulated procedures for approving CBAs and recalling officers. Plaintiff's breach of contract claims were conveniently limited and ignored, and his motion to exclude Defendants' misrepresentations that Fischbach and Corbin Dykes were the same corporate entity was denied by begging the question that his argument was "conclusory" (Appx., pp. 81-85).

After the trials of Fischbach and the Unions conspiracy to breach the CBA were bifurcated, Plaintiff was ordered to **first prove that Local 569 breached its duty to fairly represent him in grievance hearings**, was warned the case would be dismissed if Fischbach's debarments were mentioned, and Union lawyers exclaimed, "the recipe gets better every time we re-cook it."[13]

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the management members), and by Barry's appointed "secretary" of the IBEW's committee, who rode herd over Union committee appointees).

The court's plan became clear when it later also bifurcated Local 569's trial (no request) both from the main trial and Fischbach's trial.

[13] Plaintiff could sue the parties directly for breach of contract because they violated the CBA referral procedure to transfer debarred Fischbach's employees. *Hines v. Anchor Motor Freight*, 424 U.S. 554

The court said, "I'm not letting [the IBEW] out" of the Fischbach claim. The IBEW was held not liable for vetoes of the proper Bylaws for approving CBAs and for recalling officers.

Plaintiff wasn't permitted to speak during the three day ambush (he made an offer of proof on evidence of debarments but was not permitted to describe it on the record). After Fischbach and the Union interrupted his opening statement ten times the jury was recessed and he was told again to keep his eye on the grievance "ball," but he again protested that the breaches of contract and racketeering should be before the jury.[14]

The court ordered him to litigate only grievance committee issues, interrupted proof of committees' contractor/members' bias (including **Dynalectric** and NECA **managers**) by holding that

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Freight, 424 U.S. 554 (1976); *Wooddell v. IBEW Local 71*, 112 S.Ct. 494 (1991). He was not required to submit any controversy to the group he filed the Complaint against. *Glover v. San Francisco-St. Louis Ry.*, 393 U.S. 324 (1969).

Even if Plaintiff was limited to a hybrid LMRA 301 claim, this Court has held that claims against unions for breaching their duty of fair representation are inextricably interdependent with employers' breaches of contract (and could not then be "bifurcated" apart). *DelCostello v. International Broth. of Teamsters*, 462 U.S. 164, 103 S.Ct. 2290-91, 76 L.Ed.2d 476 (1983).

[14] The court excluded all evidence of motive for the transfers and *ex post facto* "grievance" hearings on grounds "motive is not an element of breach of contract" (but it is an element of "bad faith," which is necessary to prove breach of the duty to fairly represent), excised parts of a Declaration swearing the IBEW "permitted" the transfers nationally, overruled Plaintiff's testimony that no grievance was filed, excluded Fischbach's annual financial statement showing it and Corbin Dykes were separate corporations (the joint committee found the transfers didn't violate the CBA because those two corporations were one and the same) and permitted Fischbach, IBEW and Local Defendants to testify repeatedly those two were the same entity (despite holding at sidebar those two corporations had conspired to breach the CBA by transferring).

"neat theory" was irrelevant because they had "institutional bias" and because only Union committee members had a duty to be fair and ordered him to show only Union committees members' bias.

Fischbach or IBEW weren't parties at trial but made opening arguments, endless objections, cross and direct examination of witnesses, and interlocutory motions and closing argument. Local 569 and Fischbach tampered with evidence, and the main exhibit was not accepted or given to the jury until after its decision.

The court followed up non-party Fischbach's opening trial statement with a prejudicial instruction to the jury to accept "arbitration" as "legitimate and proper," and "Believe me, its a good idea," and twice said if they found against Plaintiff "we" can put it behind "us," despite admitting (out of the presence of the jury) "many gross failures in handling of the case" by those Unions, and that they and Fischbach went to the joint committees only to "take the issue out of the district court." The jury was told if it found against Plaintiff, "this part of the case is over and we'll go on to something else."

The court lead Defendants' witnesses, excluded and overruled testimony by Plaintiff, permitted overt lies and misrepresentations by Defendants and their witnesses, stated it, "did[n't] know what you mean by objective third parties," made pronouncements from the bench on the validity of the committees' decisions, sustained all of the Defendants' objections to cross-examination of their witnesses, and would not let Plaintiff recall them for rebuttal.[15]

The court also **dismissed Fischbach** by holding that Local 569 Defendants had waived any challenge to Plaintiff's claims by "acquiescence in F & M's transfer policy, prior to the raising of any complaint by plaintiff" (86-88, at 87), and held Local 569 and IBEW must pay all Plaintiff's damages if the jury found joint committee decisions which approved Defendants scheme to evade debarments were tainted (whereupon IBEW counsel shouted "I've always felt that the grievance issue is a total red herring!") (sic). Fischbach was brought back into the case because that dismissal was untenable, but was later dismissed again on equally frivolous grounds, and was awarded witness fees against Plaintiff for one of its officers who was called by the Unions as a witness at trial.

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[15] At sidebar the court said the NECA manager's comments on the Plaintiff to the IBEW's committee were "scurrilous, scandalous, inappropriate and probably defamatory and irrelevant," (and noted Pridemore was Plaintiff's "mortal enemy"), but then stressed his "objectivity" to the jury.

Plaintiff wasn't permitted to make any rebuttal of Local 569's case, and the special verdict form prepared by the judge begged the question that transferring was a CBA "practice." The jury was given more prejudicial instructions after they had stopped deliberations because they could not understand the instructions on arbitrary, discriminatory, and bad faith (they were given only more negligence instructions, over Plaintiff's objections). The court flew in the face of the *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) Supreme Court doctrine in order to protect Fischbach and the Unions from having to stand trial on their conspiracy to breach the CBA.[16]

After the court successfully confused the jury, and it found, reluctantly, that Local 569 had not failed to represent the Plaintiff fairly in the phony hearings held by the joint committees (a claim and issue which Plaintiff never sued for and objected repeatedly that he did not want to try) the court then filed dishonest orders holding that breach of contract claims had been tried (Plaintiff refused to have anything to do with those phony committees).

Fischbach's Judgment overtly misrepresented, "The issues [were] duly tried, and the jury . . . rendered its verdict" and the action was "dismissed on the merits" (Appendix, p. 89, *infra*).

The IBEW's "Judgment" misrepresented, "This action came on for trial before a court and a jury," which found a verdict and dismissed the IBEW "on the merits" (Appendix, p. 89, *infra*).

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[16] Plaintiff was not shown jury instructions or the verdict form (which prejudicially begged the question that the "transfers" were a legitimate "practice") but defense counsel was. The court would not instruct the jury that Unions had a duty, "to serve the interests of all members without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct" (*Cf. Vaca v. Sipes*, 87 S.Ct., at 910 (1967)), or instruct on motive, and did not instruct on bias or impeached witnesses.

Local 569's longwinded dishonest "Judgment" misrepresented,

> "the Court took testimony and evidence upon Plaintiff's duty of fair representation/breach of contract claims against Defendants IBEW Local 569 and Fischbach & Moore, Inc. which were brought under § 301,"

that it considered evidence of "improperly implementing" a CBA, and of an "improper ratification vote" (Appendix, 90-91, *infra*).

C. THE ATTORNEYS FEES EXTORTION

Fischbach moved for attorneys fees, that motion was denied on January 28, 1992, but the court suggested (**as it had with the transfers**) that Fischbach first take its request for fees to the joint grievance committee and get an award from them.

On June 29, 1992 Fischbach moved for reconsideration of that earlier denial (Local Rules prohibited such a motion after 30 days) on grounds that joint committee members refused to hear the matter. The court told Fischbach to take its request back to the joint committee and to inform its members they were ordered to make the fees award whether Plaintiff appeared for the hearing or not (pp. 95-114, *infra*).[17]

After that hearing Fischbach's lawyers told Plaintiff they would get an attorney fees award equal to jury verdicts he got in this case and D.C. # 85-1719 if his appeals of Fischbach's escape were not dropped, and they made good on that threat.[18]

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[17] The court became incensed when Fischbach informed it committee members would not make an award because they feared that Plaintiff would sue them for doing so (pp. 103-114, at 113).

[18] Union Defendants posted bonds and appealed Plaintiff's judgments in these two cases. When Defendants' losing appeal from D.C. # 85-1719-B was final, he applied to the court for an order as per 28 USC § 2042 to release registry funds, but it instead disbursed those funds to Fischbach, Local 569 and "interested parties." Those disbursals are the

Plaintiff immediately moved the district court to recall the case from the appeals court, and permit him to amend by adding a claim against those parties for limiting his right to sue.[19]

Plaintiff again refused to have anything to do with the joint committee, which scheduled the hearing for September 10, 1992. He then served a Notice of Special Appearance on all the parties stating the committee had no jurisdiction over him, and showed up before the hearing convened to made sure committee members had received it.

The committee again denied the request for attorneys fees, but after two members who would not make that award were purged, an abbreviated committee met secretly (no notice to anyone), and made that award two months later.[20]

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subject of Plaintiff's Case No. 95-496 Petition also before the Court.

Fischbach attorneys' threats, which they claimed are "negotiations," are verified in unrefuted Declarations filed in suits against those joint committee parties, the judge, and Fischbach's and Local 569's lawyers.

[19] The court admitted the CBA parties put the provision in the CBA because Plaintiff sued them and stated "it specifically identifies you -- everything except by name" (see Appendix, p. 105).

Plaintiff's motion to recall the case so he could amend and add a claim against IBEW, Local 569, NECA and Fischbach for conspiring to limit his L.M.R.D.A. § 101(a)(4) (29 USC 411) protected rights to sue was denied, and Fischbach was awarded another $512.50. But see *Market v. Swift*, 173 F.2d 517 (2d. Cir. 1949); *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 91 S.Ct. 795 (1971); *ALW Inc. v. United Airlines, Inc.*, 510 F.2d 52 (9th Cir. 1975); *U.S. v. Intern. Broth. of El. Wkrs. Local 130*, 72 F.R.D. 507 (1976); *Saalfrank v. O'Daniel*, 533 F.2d 325, 330 (6th Cir. 1976).

[20] The two purged committee members were the only ones not Defendants in Plaintiff's suits, he already had judgments against Union members Pridemore and Aylsworth (for fining him, expelling him from the Union, and stealing Union monies to inflate the Union officers' personal pension accounts), NECA's manager Cooper had supported Fischbach's motions with Declarations in the case-in-chief, and NECA

The court affirmed the committee's award without a hearing, and then filed an order on June 14, 1993 which **misrepresented, "There was a full and fair hearing,"** and that Plaintiff, "lost a challenge to the committee's jurisdiction."

Plaintiff timely filed motions to amend and alter both the $224,140.01 and $512.50 awards and for relief from the awards, those motions were denied on November 1, 1993, but Plaintiff successfully appealed from those denials.

D. THE CASE-IN-CHIEF ON APPEAL

After the district court ensured Fischbach did not come to trial and its Union co-conspirators escaped, and distorted the record for appeal, a circuit court panel headed by that district court judge's long-time associate filed its Opinion (115-120).

The "Not For Publication" Opinion **misrepresented** that Fischbach had benignly "transferr[ed] some of its employees to a subsidiary" (all of Fischbach's employees were transferred to fourteen subsidiaries and its co-felon Dynalectric, Inc.), that the district court had "properly bifurcated Moore's fair representation and breach of contract claims" (ignoring the second, separate *sua sponte* "bifurcation" of Local 569's trial), and that he was not prejudiced by exclusion of evidence of "motive" for conspiracy to evade federal debarments by breaching the CBA (begging the question it was "prejudicial and irrelevant") (pp. 116-117, *infra*).

The circuit court begged the question that Plaintiff challenged the finality of joint committee hearings (calling it "arbitration") held years after he alleged futility and the law of the case was established by denying Fischbach motions for summary judgment and to dismiss on every conceivable grounds (p. 117).

It found IBEW president Barry (sued only as president) was properly dismissed for lack of "personal jurisdiction."

The circuit court did not comment on appeal of the district

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appointee Raspolich was the San Diego manager for Dynalectric, Inc. which was convicted and debarred with Fischbach for bid-rigging in Georgia, and was a Fischbach transferee to evade debarments.

court's dismissal of claims against Barry for altering Local 569's Bylaws to approve the CBA provision for awards of attorney fees against Plaintiff (because he sued Fischbach and its Union co-conspirators), and ignored his appeal of district court refusal to let him amend and certify the case as a class action to conform to proof after he finally got some evidence of their racketeering.

That court also misrepresented he could not appeal prejudicial jury instructions because he did not object at trial (ignoring the instances when he did) and ignored district court refusal to permit rebuttal (Appendix, p. 120, *infra*).[21]

The court also held the lower court properly limited breach of fiduciary duty claims against IBEW and Local 569 officers.

E. THE ATTORNEYS FEES ON APPEAL

After years of continued harassment of Plaintiff by Fischbach and its lawyers (aided and abetted by both Unions, their officers and lawyers, and the district court) with seizures of his property, judgment debtor exams, other hearings, and continuing threats and extortion the circuit court finally heard the Plaintiff's appeal and reversed the baseless award.

But the Opinion (authored by yet another of the circuit court chief judge's associates, see *Marino v. Writers Guild, et al*, 93 D.A.R. 5987 (9th Cir.1993)) also distorted the record by holding fees were awarded by "arbitration," and the "Labor-Management

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[21] Plaintiff infers a collusive relationship between that district court judge and a circuit court chief judge (who chaired the appeal panel and also sits in San Diego). Their connections to former San Diego resident and felon Ed Meese (tied to a New York corporation that defrauded the Federal Government of $millions) have been published (both Fischbach and Dynalectric, Inc. are New York corporations).

The chief judge appointed the author of the biased opinion in *Moore v. IBEW Local 569*, 989 F.2d 1534 (9th Cir. 1993), which opened with an *ad hominem* attack and hid Moore's trial wins on every issue given to the jury, and he has rejected two petitions for writs of mandamus - to order that lower court judge to recuse and stop giving the damages awards by two separate juries to Local 569 and Fischbach (which they threatened would happen if he appealed). See Case No. 95-496.

Committee" was the "Appeals Committee."[22]

REASONS FOR GRANTING THE WRIT

I.

This petition should be granted because the district court's decision to make breaches of contract (the CBA) subject to later decisions by a joint committee of the same parties who conspired to successfully defraud hundreds of millions of dollars from the federal government conflicted with applicable decisions of the Supreme Court. Application of Supreme Court precedent here is both clear and unmistakable, and was cited to by the district court to first deny summary judgment motions (Appendix, pp. 50-55, 58-66, *infra*).

Despite later decisions, Plaintiff was not required to submit this controversy to a group chosen by the very defendants against whom the real complaint here was made. *Glover v. St. Louis-S.F. Ry.*, 89 S.Ct. 548, 551-2 (1969).

The court later rejected both precedent and its own holdings to permit that corrupt defense contractor to escape, and by flying in the face of the precedent deliberately sought to confuse the issues and obfuscate the facts and law.

The Unions have a statutory duty to fairly represent bargaining unit members in enforcing CBAs. *Vaca v. Sipes*, 386 U.S. 171 (1967). A member may sue both the IBEW and Local 569 for breach of contract (by violating CBA referral procedures) as was done here. *Wooddell v. IBEW Local No. 71*, 112 S.Ct.

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[22] The panel avoided publishing reversal of a "Labor-Management Committee" by re-naming it (to continue "collective bargaining" myths of "arbitration" which deny citizens meaningful access to the courts), and re-named the appeal's caption (which was *Moore v. Fischbach & Moore Inc.*) to *Moore v. IBEW Local 569, et al* to deliberately confuse it with other Opinions against the Unions, and to protect Fischbach.

The panel validated district court lies by referring to such non-existent "arbitration." Seven months later the lower court still refuses to order Fischbach to repay the Plaintiff's monies.

494 (1991).

The district court acknowledged Fischbach conspired with Local 569 to transfer its employees to Fischbach-created "puppet" entities in order to evade federal debarment orders, and violated the CBA by those transfers (pp. 34-49, 50-55, 58-66).

The district court acknowledged Local 569 business manager Pridemore (who approved the transfers) and Fischbach conspired via union-management hearings (**held without any participation or grievance by the Plaintiff**) and again approved the transfers in order to move to dismiss and for summary judgment a second time (pp. 50-55, 58-66, *infra*).

Plaintiff eschewed involvement in the *ex post facto* hearings, and filed no related breach of DFR claim. Denial of Fischbach's first round of specious motions to dismiss and for summary judgment established the law of the case. The district court should not have let Fischbach file four more rounds of motions (one of which it had initiated *sua sponte*). *Dictograph Prods. Co. v. Sonotone Corp.*, 230 F.2d 131 (2d Cir. 1956).

Granting this petition would permit review of the acts described above, which are clearly

> "instances of breach of trust, corruption, disregard of the rights of individual employees and other failures to observe high standards of responsibility and ethical conduct . . . to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce . . .."

which the L.M.R.D.A. was specifically enacted to prevent (see L.M.R.D.A. § 2, at Appendix, pp. 28-29).

The second motion for summary judgment (on grounds that the grievance hearings held after the first round of motions were *res judicata* on the district court action) put "the focus. . .on whether the employer breached the contract. . . ." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 568 (1967).[23]

Local 569's failure to administer the CBA fairly pre-empted its ability to participate in any hearing on whether its collusion with Fischbach had resulted in direct CBA breaches.

Thus, Plaintiff's suit to recover damages from Local 569 and Fischbach for breaches of their CBA contract referral procedure was authorized under the Labor Management Relations Act, and relieved the Plaintiff of requirement to exhaust CBA remedies. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1967). See also *Del Costello v. Intern'l Broth. of Teamsters*, 462 U.S. 151 (1983); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981); *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Vaca v. Sipes*, 386 U.S. 171 (1967) (if the union already breached its DFR, the contractor cannot insist on exhaustion of CBA remedies).

But even after Fischbach and Local 569 admitted breaches of their CBA and their motive) the district court made trial on those transfers contingent on the bifurcated trial on whether Local 569 breached its DFR in phony joint hearings held by those Fischbach and Union co-conspirators without any grievance being filed.

The court also used every device imaginable to subvert even that trial (including refusing to make rulings of law and denying him summary judgment while admitting no facts on their original breaches of contract were in dispute) and to allow the Defendants to escape from the real issues sued for.

Fischbach was later dismissed (during trial on whether Local 569 had tainted the grievance hearings) by the court's finding that Local 569 waived all of its rights of recourse to the grievance procedure by "acquiescence" in those transfers, and held Local

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[23] Ironically, Defendant Atkinson refused to participate in a CBA grievance Plaintiff filed after it rejected Plaintiff without cause. The court found nothing wrong with that or with the Unions' refusal to then hold a hearing because Atkinson refused to participate.

The court said he was bound to CBA remedies (despite allegations of futility) and it was okay for Fischbach and the Unions to find against him after he refused to participate and no grievance was even filed.

569 was also responsible for any damages caused by Fischbach. That dismissal was later rescinded, but the court should have made a similar ruling of law favorable to Plaintiff after acknowledging Local 569's role (Appendix, p. 87).

The district court had a double standard on Fischbach's participation in the grievance process. In holding that Plaintiff could sue Fischbach and those Unions for breaching the contract the court repeatedly found Local 569's participation in that conspiracy to transfer those Fischbach employees had "robbed" Fischbach of the grievance procedure (App., pp. 52-53, *infra*).

The court obviously, really meant Fischbach was "robbed" of the pretext it needed to dismiss the Plaintiff's claims by **misrepresenting** that he had a "full and fair hearing before an arbitrator." In fact, it was Plaintiff who was "robbed" of the benefits of the CBA, including that of a grievance procedure, by Fischbach and the Unions' fraudulent conspiracies, and it was he who was forced to go into court for some measure of relief.

L.M.R.A. § 301 (29 U.S.C. 185) provides the statutory mechanism for vindicating contract rights under such CBAs, and personal rights to wages and damages for wrongful discharge (as sued for here) may be enforced by employees directly. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562, 96 S.Ct. 1048 1055, 47 L.Ed.2d 231 (1976); *Smith v. Evening News Ass'n*, 371 U.S. 195, 198-200, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962).

LMRA § 301 authorizes the federal courts to fashion a body of federal law for enforcement of CBAs, *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 405, 101 S.Ct. 1836, 68 L.Ed.2d 248, 254 (1981), *citing Textile Workers v. Lincoln Mills*, 353 U.S., at 451, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), but the lower court and the Ninth Circuit may not aberrate that body of law to force the Plaintiff to prove a case which he never sued for and alleged to be futile, and which he would not participate in and expressly disclaimed: that of co-racketeer Local 569's conduct in the phony, exculpatory grievance hearings.

CBAs are, "equally binding and enforceable on both parties," and "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Textile Workers v. Lincoln Mills*, 77 S.Ct. 912, 916-17. The CBA may not bind third party beneficiaries to the parties' collusive, illegal acts, or be used to deny Plaintiff statutory right to sue them for breaches of contract.

The district court overstepped boundaries of accepted judicial procedure by its overt acts to create a distorted record, and by its advocacy on behalf of Fischbach, and Union Defendants, to hide their fraudulent racketeering to breach the CBA, which require the exercise of this Court's supervision powers.

The circuit court sanctioned district court departures from the usual course of judicial proceedings by begging the questions the lower court contrived: that the Plaintiff had challenged finality of arbitration (no arbitrator was ever involved, and "deference" to innately collusive joint committees can't make them arbitrators), and that evidence of their hundreds-of-millions-of-dollars-motive was prejudicial to Defendants and irrelevant. Such dishonesty requires this Court to exercise its powers of supervision.

II.

The parties also conspired to punish the Plaintiff for suing them, and to deter others from such suits, by altering methods articulated in Local 569's Bylaws and the IBEW constitution for approving CBAs by Union member third party beneficiaries.[24]

The IBEW constitution, Art. 14, § 5 gives bargaining unit members the rights to define their wages, hours and working conditions. Barry and Smith violated those rights, Local 569's Bylaws (which subsumes the IBEW constitution) and the right to sue protected by L.M.R.D.A. § 101(a)(4) (29 USC 411).

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[24] Fischbach attempted to distance itself by begging the question in its Petition No. 95-485 that an "employer association and a union" were responsible for adding a CBA provision to award attorneys fees against Plaintiff, but Fischbach signed the CBA and its ex-supervisor Smith had the numbered ballots and envelopes printed when IBEW president Barry unilaterally changed Local 569's Bylaws to permit the mail-in vote. Local 569 business manager Smith destroyed those ballots after Plaintiff requested them in discovery.

Fischbach also misrepresented in "Question Presented" that Defendants collusive imposition of that provision to shift attorneys' fees onto the Plaintiff was "arms' length bargaining."

Barry also violated Local 569's Bylaws by unilaterally changing its provisions for a secret-ballot in-person vote to a desperation one-time ballot stuffing mail-in ratification vote.

The district court at first denied summary judgment on the Plaintiff's breach of contract claims against Defendants for those acts (Appendix, p. 73), but later arbitrarily refused to give the issue to the jury. By denying Plaintiff's claims for breaches of the contract the court deliberately flew in the face of the Supreme Court's applicable decisions.

It is well settled that a union constitution is a contract within the meaning of LMRA § 301. *United Assoc. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Local 344*, 452 U.S. 615 (1980).

Because district court denial of summary judgment on breach of contract claims against IBEW and Local 569 Defendants for implementing the CBA (App. 73) (which contained the provisions for awards of attorneys fees against Plaintiff) became the law of the case, and good reason to change the prior decision was never shown, it departed from the usual course of judicial proceedings. *Cf., Dictograph Prods. Co. v. Sonotone Corp., supra; Breeland v. Southern Pac. Co.*, 231 F.2d 576 (9th Cir. 1955).

The court's decision to convolute the facts and insist IBEW president Barry was sued in his "personal" capacity, rather as a Union officer, overstepped the boundaries of accepted judicial procedure in order to permit him to escape the claims. The right of access to the courts is basic to our system of government, and is a fundamental rights established by the constitution:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907).

The district court pretended to rule on the Plaintiff's claims as required by law, but did not intend to permit him meaningful access to the court to redress those wrongs done by Defendants in the course of protecting their racketeering schemes.

A mere formal right of access to the courts does not pass constitutional muster, and courts have required that the access be "adequate, effective, and meaningful." *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72 (1977).

The IBEW president and Local 569's business managers, by conspiring to order the Local's Bylaws changed, and to have the Plaintiff's Bylaws proposals (which had been properly passed by the Union's members) vetoed by Barry in order to manipulate the CBA to further the racketeering scheme (and punish Plaintiff for suing them) departed from the usual course of such judicial proceedings, conflicted with applicable decisions of the Supreme Court, and require exercise of its powers of supervision.

This Court should review the parts of the body of labor law which federal courts fashioned to promote collective bargaining to assess whether collusion by CBA parties - to abuse exemptions by federal courts - warrants the exemptions from normal contract law standards, especially in light of abuses of CBA third party beneficiaries who only exercise rights guaranteed by the Labor-Management Reporting and Disclosure Act, and the Constitution.

Petitioner is confident that review of this case will result in remand for a trial on breaches of the CBA, Local 569's Bylaws, and the IBEW constitution contracts used to evade debarments.

III.

The petition should be granted because the Defendants and district court's use of the CBA attorneys fees provision to extort him to drop appeals of those courts' abuses of the relevant facts, law and issues have overstepped boundaries of accepted judicial procedure, and they have required this Court to exercise its powers of supervision.

Plaintiff's unrefuted Declarations documenting the extortion attempts are in the record below.

Dated: 12-22-1995 Lawrence Moore

Lawrence Moore

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LABOR MANAGEMENT RELATIONS ACT

Suits By and Against Labor Organizations
(29 U.S.C. 185)

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Declaration of Findings, Purposes, and Policy

(29 U.S.C. 401)

Sec. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

TITLE I - BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

(29 U.S.C. 411)

Sec. 101. (a)(1) Equal Rights. - Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly. - Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation Fees, and Assessments. - Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except -

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the Right To Sue. - No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards Against Improper Disciplinary Action. - No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer unless such member has been (A) served with written charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

TITLE V - SAFEGUARDS FOR LABOR ORGANIZATIONS

Fiduciary Responsibility of Officers of Labor Organizations
(29 U.S.C. 501)

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

TITLE VI - MISCELLANEOUS PROVISIONS

Prohibition on Certain Discipline by Labor Organization (29 USC 529)

Sec. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order Dismissing Second Amended Complaint Against Defendant J.J. Barry Individually For Lack of Personal Jurisdiction

This cause came on to be heard on defendant J.J. Barry's motion to dismiss the Second Amended Complaint on the ground that this court lacks jurisdiction over the person of the defendant, in his individual capacity, and the Court having granted the motion to dismiss for lack of jurisdiction, it is hereby,

ORDERED, ADJUDGED AND DECREED that the Second Amended Complaint be dismissed as against Barry for lack of in personam jurisdiction.

FILED: JUN 20 1989 Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Transcript of Proceedings Before
The Honorable Judge Rudi M. Brewster
SAN DIEGO, CALIFORNIA TUESDAY, FEB 20, 1990
(Call to order of the Court.)

MR. L. LEVY: Lewis Levy and Abe Levy appearing on behalf of IBEW Local 569.

MR. ALLENBY: Norman Allenby representing Defendant and moving party on summary judgment, Fishback, Moore.

THE COURT: Okay. Thank you, Mr. Allenby. Who's appearing for the Plaintiff:

MR. MOORE: Lawrence Moore appearing for himself, your Honor.

THE COURT: All right. Well, gentlemen, I've reviewed the moving and responding papers. Let me tell you what it appears to me the tentative ruling should be, and then if I've fallen off the trolley you can help me.

First of all, the motion for summary judgment by the Defendant Fishback and Moore, with regard to the seventh cause of action: it appears that motion should [not] be granted.

The three bases for it -- all three appear to me to be applicable, and they apply. The seventh cause of action does not complain of discriminatory referrals by a union, but complains only of a breach of the agreement by Fishback and Moore. Now, I'm referring to the argument by Fishback and Moore that this is within the exclusive jurisdiction of the NLRB.

It appears to the Court that the Federal Court has concurrent jurisdiction with the board to entertain claims of the breach of a collective bargaining agreement. This is not a situation where the Plaintiff is contending that his union discriminatorily referred. He's contending that the employer breached the collective bargaining agreement; and therefore, I don't believe that this is within the exclusive jurisdiction of the board.

Now, with respect to the merits of the agreement that Fishback and Moore -- of the argument that Fishback and Moore have propounded: Fishback and Moore argued that they're the same entity, that Carbon, Dykes (phonetic) are the same as Fishback and Moore, and therefore, hiring from each other does not violate the collective bargaining agreement.

I can't agree with that. The two corporations are separate corporations, and one may be wholly-owned by the other, but they're separate corporations, and they are separately signatories to the collective bargaining agreement.

Therefore, the motion for summary judgment by Fishback and Moore on the grounds that they are the same entity, and therefore, they can hire employees from each other, that has to be denied. I think that Carbon, Dykes has to hire their employees out of the hiring hall just like Fishback and Moore. The fact that one is a wholly-owned subsidiary of the other, in my view, doesn't change the law in that regard.

Fishback and Moore also urges that the contention on the seventh cause of action is moot. And that's not so, because the Plaintiff is suing for damages for past conduct. He's not -- it's not moot. His past damages -- whether he can prove damages, that's another matter. But the fact that Fishback -- and I'm accepting it as a given, as true, that Fishback and Moore have stopped doing that. I mean, I accept that as true. But having accepted that arguendo as being true, it doesn't make the dispute moot, because the Plaintiff is seeking damages for lost wages that he suffered because of the practice. Paragraph 63(c) of the second amended complaint sets that forth. So, mootness would not apply.

So, for all those reasons, the seventh cause of action -- a motion for summary judgment must be denied on behalf of Fishback and Moore.

. . .

MR. ALLENBY: May it please the Court, two questions: I take it, insofar as the denial on the faces of the failure to exhaust administrative remedies, that that remains as an issue of fact in -- as an affirmative defense, as opposed to your finding that he has, in fact, complied.

In other words, we sit here --

THE COURT: Well, that wasn't an exhaustion deal. That was a -- that was a -- you argued the exclusive remedy in the NLRB.

MR. ALLENBY: No, that's the preemption problem. We concede you do have concurrent jurisdiction.

It's my understanding that we also argued that there was an exhaustion problem in that the matter was supposedly handled within the machinery of the existing collective bargaining agreement.

THE COURT: I don't recall that that was raised in the context of the seventh cause of action. Was it?

MR. ALLENBY: I'll re-examine it, then.

THE COURT: I'm sorry?

MR. ALLENBY: I'll re-examine that.

The other question was that, insofar as the -- your comments that relate to Carbon, Dykes as a wholly-owned subsidiary: we have the problem in the existing agreement of the effect of the double-breasted work preservation problem.

And that is that, where you have a wholly-owned subsidiary, that for purposes of this agreement, they are treated as one and the same; the idea being that, to do it any other way would be to attempt to mislead the Union, which we're prohibited from doing under that clause, 2.16.

And the other point being that it was common practice of those entities similarly situation to act in that matter. So that, in effect, if we were hiring for Fishback and Moore, we were hiring for Carbon, Dykes as well.

However, when we were told to stop, and that was -- that was commenced because of this very problem that Mr. Moore has suggested -- we did stop at the behest not of Mr. Moore, but at the behest of the Union. Although, up until that time, the practice was open and aboveboard and everybody knew exactly what we were doing.

So, it seems to me that we're in a curious situation where we're damned if we do and damned if we don't.

THE COURT: Well, I don't see where you're damned if you don't. In other words, you have two corporate entities, do you not?

MR. ALLENBY: One is a wholly-owned subsidiary; that is, it's controlled; that is, Carbon, Dykes is controlled within the meaning of 2.16 by the stockholders in Fishback, Moore.

And to that extent, for purposes of a performance under the collective bargaining agreement, they basically are treated as one entity.

THE COURT: But they both signed the collective bargaining agreement.

MR. ALLENBY: That's correct. That is -- that's required. That's part of the open and aboveboard disclosures that are made when you have that situation, so that you can't be accused at some later date of running a non-union operation or something that the Union doesn't know about. And that's also the purport of the letter that suggests that Fishback, Moore is responsible for the indebtedness of Carbon, Dykes.

It's those kinds of representations and those kinds -- that kind of paper trail that the Union insists upon in order to avoid the problem of running a non-union operation that they don't know about for which they've -- for whose employees they received no union benefits.

That's the intent behind that whole double-breasted provision in the agreement. And it seems if we don't comply with it, that we can then be accused of some kind of subterfuge which is obviously not what we were about.

THE COURT: Well, it may be that you're not -- I mean , I'm -- there's nobody accusing -- well, maybe Plaintiff will --

MR. ALLENBY: He will. He most certainly will.

THE COURT: The Plaintiff may be. That's fine. But the fact here -- the problem that you have is: if two -- I assume they're California corporations?

MR. ALLENBY: One is an Arizona corporation.

THE COURT: Okay. You have two separate corporations.

MR. MOORE: One's New York, one's Arizona.

THE COURT: All right. You have two separate corporations. One of them may be the wholly-owned parent -- the wholly-owned subsidiary of the other.

MR. ALLENBY: Yes.

THE COURT: All that means is that, all the stock in one happened to be owned by another corporation. That doesn't merge them. They're still corporate entities. They're still entitled to legal liability. They still rise and fall on their own two feet.

MR. ALLENBY: Well, I agree --

THE COURT: And if Carbon, Dykes committed some kind of a tort or whatever, the liability would be limited to Carbon, Dykes, assuming you don't pierce the corporate veil.

MR. ALLENBY: Well --

THE COURT: And if they're a sufficient corporation, that's the end of it.

MR. ALLENBY: I would agree with that analysis 100 percent in a corporate arena. But when you place those same set of facts in the context of a collective bargaining agreement, and in the labor/management arena, then you have the kinds of cases that were cited by counsel, which are inapposite, because there you see what the -- employer was trying to do was prove that this subsidiary was not combined with his operation.

But here, we're saying, up front, as we believe is required by practice, and is required by that double-breasted provision, we have to do that in order to comply with the Union's -- with the intent behind that particular provision.

THE COURT: I don't -- I don't think I follow that. You've got -- two corporations signed the collective bargaining agreement. They are both employers. They both are parties to the inside agreement.

Now, if one of them hires out of the hiring hall, and the other one gets their employees from some other corporation, what difference does it matter that the corporation they get their employees from happens to be their parent? I mean, what -- for example, what if Fishback and Moore --

MR. ALLENBY: Well, for --

THE COURT: Suppose -- let me ask this. Suppose Fishback and Moore got all their employees from Atkinson. Would you think that's a violation of the collective bargaining agreement?

MR. ALLENBY: That's a whole different -- that's a different proposition.

THE COURT: Do you think that would violate the collective bargaining agreement?

MR. ALLENBY: It -- yes, it would.

THE COURT: It would?

MR. ALLENBY: It would not violate the collective bargaining agreement. I think it would -- it would violate the hiring hall procedure.

THE COURT: Yeah. That's what I mean.

MR. ALLENBY: But that's not what we --

THE COURT: Well, that's part of the collective bargaining agreement.

MR. ALLENBY: That's not what we're concerned with here. What we're concerned with here is the -- from a contractor's standpoint, is, "Look, we were trying -- we're going to bid things as a general contract. We may bid it as a subcontract": the whole different reasons why you might have a wholly-owned subsidiary, and involved in bidding different jobs, and you might have to have another corporation for different reasons than what you're suggesting.

What I'm saying is that, from the corporation's standpoint, from the employer's standpoint, what he is interested in is keeping good people on the payroll, and if those good people are good as to Fishback, Moore, they're good as to a subsidiary, and if the subsidiary is doing a job and it needs people, from his standpoint, it is more economical, it's better practice, you get better results, if those good people are retained in one or the other. That's the practical effect of it.

THE COURT: Well, I'll tell you. I think, back at the very beginning, I think they should have thought through their situation. But when they chose to do business through separate corporations, and they both went in separately and signed the inside agreement as separate entities, I think that that's where they may have urinated in their nest.

MR. ALLENBY: Well, that --

THE COURT: In fact, I can understand that they may want to give a good employee that's working for F&M -- I can understand where they want to -- may want to send him down to do a job for Carbon and Dykes. I can understand that. And I can understand why Carbon and Dykes might want to send somebody up to Fishback and Moore. That's fine.

But it's still a violation of the collective bargaining agreement, because the collective bargaining agreement requires these signatories to get their help through the union hall -- the hiring hall.

MR. ALLENBY: Well, except that the practice, as I understand it, and as is reflected in the documents, says that that's not the way that this provision was administered because of the double-breasted provision.

And so, what we're doing is --

THE COURT: I don't know -- I don't know how this colloquialism "double-breasted" does anything for our analysis. I'm trying to stay away from this label. I'm just trying to analyze what is happening here, and I don't see -- I don't know how this "double-breasting" euphemism helps me.

MR. MOORE: It has nothing to do with it.

MR. ALLENBY: Well, it's not a euphemism.

THE COURT: How does that help me?

MR. ALLENBY: It's not a euphemism. It's an express provision in the agreement that imposes obligations upon Carbon, Dykes and the upon Fishback, Moore.

MR. MOORE: It doesn't have anything --

THE COURT: Such as what?

MR. ALLENBY: To do what?

MR. MOORE: Can I be heard on this, your Honor?

THE COURT: Not yet. Such as what?

MR. ALLENBY: Such as, if the one is a wholly-owned subsidiary and is controlled by -- in this instance, Carbon, Dykes is controlled by Fishback, Moore; then, for purposes of this collective bargaining agreement -- they have treated as a single employer. That's the whole purpose of 2.16, the work preservation portion of the agreement.

(Pause.)

MR. A. LEVY: Your Honor, on --

MR. ALLENBY: Am I right, Mr. Levy?

MR. A. LEVY: Yeah. I just want to say, on behalf of the Union, which administers the contract, the Union treats wholly-owned subsidiaries as being the same employer for the purposes of the administration of the agreement.

MR. MOORE: No, they -- they put in separate calls for men.

MR. A. LEVY: We would -- we would --

MR. MOORE: That's the problem here.

MR. A. LEVY: Mr. Moore, I --

THE COURT: Just a second, gentlemen. Just a second. Let me just read this. Just give me a minute. Everybody, just give me a minute.

(Pause while the Court reads silently.)

THE COURT: Let me just ask you a question about this. It says Section 2.16, and then, "double-case" -- all caps, it says, "DOUBLE-BREASTED-WORK PRESERVATION,," and then there's a little "a." Do you notice that?

MR. A. LEVY: Yes.

THE COURT: And then there's a little "b" with -- all caps, it says, "REMEDY." And then you read on, and there's a little "c" and it says "indemnification."

MR. A. LEVY: Yes.

THE COURT: And then eventually, there's a "Section 2.17, management rights."

Now, do A, B and C of paragraph 2.16 -- do they all pertain to the subject of double-breasted-work preservation?

MR. ALLENBY: Yes, they do.

THE COURT: And number B is called remedy. Now, number A doesn't have any title.

MR. ALLENBY: That's right.

THE COURT: But B and C each have a title; B is remedy and C is indemnification. Do you see that?

MR. A. LEVY: Yes.

THE COURT: So, does B -- is that to be meant -- is that to be interpreted to mean a remedy for some kind of a beach of A?

MR. A. LEVY: Let me consult with co-counsel. He's whispering, and I disagree with him.

(Pause to confer.)

THE COURT: You know, gentlemen , what it looks like to me: paragraph B -- it appears to me, paragraph B doesn't even relate to 2.16(a).

MR. A. LEVY: I was just going to say: the copy that I have does not relate to 2.16. It says -THE COURT: It talks about remedies for arbitration awards.

MR. A. LEVY: That's correct.

THE COURT: For any breaches of the collective bargaining agreement.

MR. MOORE: Right.

MR. A. LEVY: That's right.

THE COURT: Having nothing to do with double-breasted or single-breasted --

MR. MOORE: Right. It's irrelevant. Can I be heard on this at some point, your Honor?

THE COURT: Not yet.

MR. MOORE: Not yet.

MR. A. LEVY: Your Honor, go ahead -- do you have some questions you want to ask me, or Mr. Allenby?

THE COURT: I'm asking you questions. I think that's what I'm doing here.

MR. A. LEVY: B applies to any violation. B applies to any violation --

THE COURT: Yeah, it hasn't got anything to do with 2.16(a), right?

MR. A. LEVY: Yeah.

THE COURT: So, what we're looking at is --

MR. A. LEVY: But C, however --

THE COURT: What we're looking at here is a drafting peculiarity, aren't we?

MR. A. LEVY: Yes. Right.

THE COURT: So, let's forget about B and C, 'cause they don't seem to have anything to do with double-breastedness, do they?

MR. A. LEVY: They don't, apparently, have --

THE COURT: So, we've just got to look at 2.16(a). That's the extent of the subject of double-breasted, right?

MR. A. LEVY: That's correct.

THE COURT: And it seems to tell me that, to protect the employees, under this agreement, which means all the members of the Union -- right?

MR. A. LEVY: Correct.

THE COURT: In order to protect them, all the work performed by them, and in order to prevent any device or subterfuge, to avoid the protection and preservation of such work by the employees, it's agreed as follows:

> "If the employer shall perform any work of the type by this agreement, either under his own name

> or under the name of any other, such as a corporation, a company, a partnership or any other business entity, including a joint venture, wherein the employer, through his officers, directors, partners or his stockholders, exercises either direct or indirect management, control or majority ownership, the terms and conditions of this agreement shall be applicable to all such work."

MR. A. LEVY: That's right.

THE COURT: And that means the hiring hall provisions will be applicable to all such work.

MR. A. LEVY: That's correct.

THE COURT: In other words, the double-breasted agreement, as far as I'm concerned, doesn't support Mr. Allenby's position at all. In fact, it speaks against it. It says just the opposite. To me, it says just the opposite of what he's asking me to read it to say.

MR. A. LEVY: Let me try to explain it if I can, your Honor. This section is intended to remedy the violations of the agreements by employers who set up other entities which they control directly or indirectly, but which they attempted to operate, non-union.

THE COURT: Yes.

MR. A. LEVY: So, this is intended to cover --

THE COURT: Okay.

MR. A. LEVY: -- that occasion.

THE COURT: Okay, I understand. In other words, they can't go out and hire, other than through the union hall.

MR. A. LEVY: That's -- they can't set up another entity and operate that as a non-union shop after they have a union shop going and --

THE COURT: Yeah.

MR. A. LEVY: -- that signatory.

THE COURT: Exactly.

MR. A. LEVY: That's designed to do that. Now, in that situation, we take the position -- the Union takes the position that the wholly-owned entity or subsidiary is signatory for the collective bargaining agreement by virtue of Section 2.16(a).

MR. MOORE: They signed their own letter of assent.

THE COURT: Well, in this case, they signed their own.

MR. MOORE: Right.

MR. A. LEVY: That's correct.

MR. MOORE: It has nothing to do -- it's completely irrelevant to the issues here. Completely.

MR. A. LEVY: May I go further, without interruption? In daily practice and application of the agreement, the Union -- there are other employers besides Fishback and Moore who are in the same situation for various reasons. They have (inaudible).

The Union treats both entities as being a single employer. Now, the reason Fishback and Moore signed two agreements and set up a separate entity is very, very simple. Fishback and Moore cannot, by court order, bid on any Federal Government work. They evolve with some problem with the Federal Government.

So, they set up another company --

MR. MOORE: They were debarred from Federal projects.

THE COURT: I understand.

MR. MOORE: And they're back-dooring their employees out with --

THE COURT: I understand. I understand.

MR. A. LEVY: Yeah. So, they set up a company called Carbon, Dykes, which is a separate entity for the purposes of that law which is debarring them, and they bid through Carbon, Dykes. And when they do work under Carbon, Dykes, the Union considers both companies to be one company, and has never required either Fishback and Moore or any other employer to send their people through the hiring hall again. They keep their people. They send them to a job site to do work for Carbon, Dykes, they come back and they send them out to do another job for Fishback and Moore, but they're working basically for the same employer.

THE COURT: I -- you know --

MR. A. LEVY: And that's the practice that's --

MR. MOORE: Which brings up the --

THE COURT: Just a minute. Just a minute. You know --

MR. A. LEVY: We come back to the situation where the industry applies the agreement in one way --

MR. MOORE: No, no, I've got to have --

THE COURT: What you're telling me -- let me just impute all of what you just said to Mr. Allenby. He may not want me to do that, but let me just for the -- arguendo, let me just put all of what you just said in the mouth of Mr. Allenby.

Now, Mr. Allenby, what you're telling me is that, because your client has engaged in some corporate subterfuge to permit it to get Federal work which it's otherwise illegal getting, that because they're doing that, they should be allowed to hire through Fishback and Moore, from the union hall, and send Fishback, Moore employees over to Carbon, Dykes who's going to do this Federal work which Fishback, Moore cannot do, and which Carbon, Dykes is going to do, and all the profit from Carbon, Dykes is, by definition, Fishback, Moore.

So, what you're telling me is that, this is the most transparent, the most patent violation of the Federal order disbarring Fishback, Moore from doing Federal work. That's what I'm hearing.

MR. MOORE: That's right.

MR. ALLENBY: That's --

MR. MOORE: Not only that, they're violating the simple contract at the Union by not providing these job calls through the referral procedure.

THE COURT: Let me say this, Mr. Allenby: whatever reasons, and however legal or illegal it may be, for Fishback, Moore to do Federal Government work under the name of some other wholly-owned unit, whatever the legalities of that are, they're not before me and I'm not concerned; although I think it's rather -- I think it's rather astounding that you're sitting telling a Federal Judge that they're screwing the Government somehow.

MR. MOORE: Your Honor, that's the subject of discovery, and that's why I've got this petition for -- I've got his Rule 56(f) motion in there. I'm in the middle --

MR. ALLENBY: Let me just -- let me just --

THE COURT: Let me just say: all of that being aside, Fishback and Moore is a corporate entity, and Corbin, Dykes is a corporate entity, and both of them, as corporations, came into the union hall and they signed the collective bargaining agreement, an inside agreement, a copy of which -- one of the copies of which I've read a number of times, 'cause I've been through the ringer with these people.

And now, you're telling me that somehow, because one of them owns the other, that the child doesn't have to hire through the hiring hall, only the parent has to hire through the hiring hall. That's what you're telling me.

MR. ALLENBY: And that's been the practice.

THE COURT: Well, I've learned -- that's another thing: you keep saying, "That's been the practice." The problem is: there are a lot of things, Mr. Allenby -- you haven't been sitting here for months.

MR. ALLENBY: I've been doing labor law for a long time.

THE COURT: Yeah, but you don't know any labor law at all until you've sat through a trial of Moore against Union 569. Let me just tell you something: you don't know any labor law at all until you've sat through such a trial, and I did sit through such a trial.

And I'll tell you this: I learned from the evidence in that case that there were a lot of practices going on which didn't cut the mustard, and the jury didn't like them, and the Defendants got rapped for some of their practices. And this one sounds to me like another one of them that may go down the tubes.

MR. ALLENBY: Let me explain, for the record.

MR. MOORE: You Honor, can I say one thing at this point before we get into the meat of all this stuff?

THE COURT: No, you can't.

MR. ALLENBY: Let me say, for the record, your Honor --

MR. MOORE: I've got a 56(f) opposition here, a declaration. I haven't done discovery on these guys. These guys have been stonewalling me for two years.

THE COURT: Look, I've denied -- so far, I've denied their motion. Do you want me to change my ruling?

MR. MOORE: Both --

THE COURT: No. We're arguing about the seventh cause of action right now.

MR. MOORE: Yeah, but you gave a motion for summary judgment when I've got -- in the middle of discovery, and I just finally got an order on a motion to compel against them, and you --

THE COURT: I'm denying -- we're talking about the seventh cause of action, and so far I've denied their motion. Do you want me to change my ruling?

MR. MOORE: No. On any cause --

THE COURT: Then, please be quiet. Please sit down.

Now, what do you want to say, Mr. Allenby?

MR. ALLENBY: I want to say, for the record, your Honor, that the debarment order -- there are two debarment orders. The first only runs --

THE COURT: You don't have to defend what you're doing. I don't care what you're doing with the Federal Government.

MR. ALLENBY: I do. I do, because --

THE COURT: All I've got before me is this inside agreement, and Fishback and Moore and Carbon, Dykes are separate corporate entities, and as far as I'm concerned, they're each going to have to hire their employees out of the union hall. That's my ruling.

MR. ALLENBY: Well, then --

THE COURT: And the fact that you've been doing it otherwise for years doesn't persuade me that it's right. Just because they've been doing it this way for years doesn't make it right.

MR. ALLENBY: Well, I take it that that's not a finding, but that's an observation.

THE COURT: I'm just denying your motion for summary judgment.

MR. ALLENBY: All right.

THE COURT: I'm not -- we're not entering judgment today.

MR. ALLENBY: Well --

THE COURT: I've got a motion to rule on, and I'm denying your motion. In other words, you're asking me to find, as a matter of law, that what you're doing is perfectly okay, and I'm saying --

MR. ALLENBY: No, it's consistent --

THE COURT: Yeah.

MR. ALLENBY: It's consistent with the past practice and consistent with the agreement.

THE COURT: It may be consistent -- well, it may be -- no, I'm finding that there's an issue of fact as to whether it's consistent with the agreement.

MR. ALLENBY: Okay.

THE COURT: It may be consistent with past practices, Mr. Allenby, but that doesn't -- that, plus a quarter, will get you a cup of tea.

MR. ALLENBY: I hear what the Court is saying, but --

THE COURT: You have to be standing on the agreement, not on past practices.

MR. ALLENBY: I have to stand on the truth, is what I have to stand on. And if that's the way it --

THE COURT: But your position of your client has to be won or lost based on whether it meets the contractual requirements, not based upon whether everybody's been doing it this way, so we're not doing anything that nobody else is doing.

MR. A. LEVY: Your Honor, may I -- in view of the Court's ruling -- and I don't want to be charged later on of being underhanded or any other allegations Mr. Moore chooses to make.

We're now in the position where the contract says that any grievance or dispute resolved in arbitration -- we now have to take this dispute to arbitration, which is -- the board of arbitration is the one that has the power to decide whether they violated the contract or not.

THE COURT: Well, I think that -- I think that this cause of action brought by Mr. Moore in which he alleges that the employer has violated the collective bargaining agreement because he's not hiring through the hiring hall -- it seems to me that that is a grievable charge, and that it is subject to the Labor/Management Committee and the CIR and all the rest.

MR. A. LEVY: Well, that's what we're going to do.

THE COURT: I don't know why you haven't done it.

MR. ALLENBY: On behalf --

MR. A. LEVY: 'Cause we believed they weren't violating the contracts.

THE COURT: Well, maybe they're not. It looks to me like they are, but what do I know?

MR. A. LEVY: You're only a Federal Judge.

THE COURT: It doesn't mean anything.

MR. A. LEVY: Yeah.

THE COURT: But it looks to me like you're violating the agreement.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

. . .

Colleen R. Friend — Dated: 9-25-90
Transcriber

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Transcript of Motions Hearing Before
The Honorable Rudi M. Brewster
SAN DIEGO, CALIFORNIA, MONDAY, FEB 25, 1991
(Call to order of the Court.)

MR. MOORE: Lawrence Moore appearing for himself. Good morning, your Honor.

MR. ALLENBY: Good morning, your Honor. Hillyer and Irwin by Norman Allenby and Dorothy Almour.

THE COURT: Okay. This isn't going to take long.

. . .

At any rate, in this case, it appears from the facts here that Mr. Moore did not file a written grievance against Fischbach and Moore or against the Union prior to his filing a lawsuit in this court alleging the conduct of Fischbach and Moore as being in violation of the collective bargaining agreement.

And so, the first question is whether that is a prerequisite. The Defendants contend that it is and that it was eventually taken over for Mr. Moore by the Union, and the Union grieved it. It was heard by a labor-management committee, and the ruling was favorable to the Defendant Fischbach and Moore -- the employer.

It was appealed by the Union. This was all without any participation by Mr. Moore, who expressly disclaimed his confidence in the Union's handling of his grievance. It was appealed to the labor council . . .. And that labor council ruled in favor of the employer, Fischbach and Moore. The collective bargaining agreement provides that such a determination by the council is final and binding, and that the fact that Mr. Moore did not bring the grievance does not avail him because it was brought for him by the Union.

Now, that's the basic black-letter law. But, there's an exception to that law, and its found in the case of Hines v. Anchor Freight Lines (phonetic). I'm sure that all counsel are aware of it. That case holds that the employee is not bound by the grievance procedure in a collective bargaining agreement if the employer or the union is acting not in good faith or not faithful to the issues and the interests of the employee.

Mr. Moore alleges in his complaint in this case that the Union did act in bad faith and was not acting in good faith representing his issues and his interests in this matter. And it is, therefore, the Court's opinion that we're dealing with an allegation of Hines v. Anchor Freight Lines, which is the exception to the black-letter law that I earlier summarized.

And so, all that is background to putting this in context. We have a motion for summary judgment here brought by Fischbach and Moore. Basically, it's based upon the black-letter law that I just recited earlier. And if that's all that we're to deal with, they would be entitled to summary judgment because they went through the grievance procedure and won.

Unfortunately for Movant, the Plaintiff's complaint implicates the doctrine of Hines v. Anchor Freight, and under that doctrine, the decision of the labor council is not final and binding on the Plaintiff, and the Plaintiff does have recourse under the LMRA to sue the Union for failure to properly represent him, and furthermore, to sue the employer for breach of the collective bargaining agreement and to litigate the otherwise grievable issue out of the CBA.

. . .

I don't think I can grant summary judgment for Fischbach and Moore -- not because of anything they've done wrong, but basically because the contention is made that the -- the employer doesn't have an obligation to fight the issues on behalf of Mr. Moore. But the Union does, and there is plenty of evidence in this record -- in this file and filed with the parties which suggests to this Court that there is at least a material fact as to whether the Union acted in good faith on behalf of Mr. Moore.

I don't need to cite all of them, but just for one of them, the Union from the very beginning took the position that there was no breach of the agreement. They filed declarations to that effect. Mr. Pridemore filed a declaration to that effect in this court, in fact, and thereafter, Mr. Pridemore represented Mr. Moore in all of the proceedings thereafter against the employer.

So there is - in my view, there is an issue of fact as to whether Hines v. Anchor Freight applies. And under those circumstances, I've got to deny the motion for summary judgment.

MR. ALLENBY: I think a distinction between the Hines case and Mr. Moore's position is quite simple, namely that this arbitration -- which was, incidentally, invited by this court at the earlier hearings --

THE COURT: Well, I was just curious why nothing had been done, and counsel's response was, "Because the employer hasn't violated it."

. . .

MR. ALLENBY: What we did at that point in time, by virtue of that conduct, we recognized that for purposes of that collective bargaining agreement -- because Fischbach and Moore was financially responsible, we recognized that for purposes of that agreement, Fischbach and Moore and Corbin Dykes were to be treated as a single employer. And therefore, as a single employer, they had the right to transfer people between Corbin Dykes and Fischbach and Moore.

THE COURT: This was agreed to in writing with the Union as Corbin Dykes came in?

MR. ALLENBY: That's correct.

THE COURT: Well now, where is that?

MR. ALLENBY: I believe it's in the first summary judgment, and it's attached to the declaration of Mr. Pridemore . . ..

THE COURT: However, if you're telling me that there was an agreement made by the Union and Fischbach and Moore right at the outset, in which it was agreed that Corbin Dykes would be treated as Fischbach and Moore for hiring hall purposes, I'd want to see that. Where is it?

MR. ALLENBY: It's not that specific.

. . .

THE COURT: I think the effect of Hines and Vaca -- I think the effect of those decisions is, in effect, to rob the employer of the grievance remedy where a union acts in bad faith. And if that's true, then your recourse is to an uninfected body.

But, that's why the Plaintiff brought you here. He was seeking what he regarded as an uninvolved body to decide. But, that would mean, then, that you have to win -- if you want to call it -- you have to win the collective bargaining issues as to whether or not you can hire for Corbin Dykes, as well as Fischbach and Moore. You have to win that issue in the District Court. You can't win it in grievance because there is no grievance procedure to win it with.

. . .

It robs you of the grievance procedure.

. . .

So, I can't grant them summary judgment. And if there's a flaw in the grievance procedure, then the effect of that is, as I view the law, that there is no grievance procedure which the employer can hang onto.

Therefore, the effect of it is that nothing happened. You came up here de novo.

. . .

I hear what you say, Mr. Allenby, and I'll be honest with you. I wish I could grant the summary judgment. I don't think I can because there is an issue of fact stated in these pleadings and in these declarations. There is an issue of fact raised as to whether the Union was acting in good faith. And if they were, I think the effect of that in Hines says that the employee is entitled to go into District Court because there's been no grievance procedure that bars him.

And if he isn't barred by the grievance procedure, he can go into District Court and he can sue the employer for breaching the agreement and he can sue the Union for breaching the agreement. And that's what he's done. And he's entitled to a de novo determination by this Court as to whether the hiring by Fischbach and Moore and then transferring to Corbin Dykes violated the collective bargaining agreement.

. . .

MR. ALLENBY: The letter was signed concurrently with the signing of the agreement by Corbin Dykes that brought them into this jurisdiction, to enable them to take over the work that otherwise would have been bid by Fischbach and Moore.

MR. MOORE: Otherwise could not have been bid by Fischbach and Moore, because they were debarred.

. . .

THE COURT: I keep coming back to the question in my own mind. And that is, why is Corbin Dykes put up as a separate signatory in the collective bargaining agreement at all? If they're just going to be the back room of Fischbach and Moore, you don't need Corbin Dykes to be a signatory.

MR. ALLENBY: That's explained in the papers, your Honor, and that is that Fischbach and Moore was faced with a debarment order. And Fischbach and Moore then brought Corbin Dykes in to bid work that Fischbach and Moore was otherwise unable to bid, and in that process, to have crews which it did not have, which Fischbach and Moore had to do that work on which it was a successful bidder.

THE COURT: You know, to be honest with you, I suppose I shouldn't draw this inference from all that. But, what you've just described to me is, Fischbach and Moore, for some reason or another, became debarred or disbarred from doing business on some contract . . .. So, they got disciplined, and the discipline was that they're out of business for a period of time . . ., can't bid new work. So, what it seems to me you've described to me is that they went ahead and created another puppet company . . .. Their wholly-owned subsidiary, and they transfer their contract to their wholly-owned subsidiary . . .. So, instead of them bidding the new work, they bid the new work through their wholly-owned subsidiary, and then let the wholly-owned subsidiary do the work. So, Fischbach and Moore essentially is doing the work, anyway.

. . .

MR. MOORE: A violation of public policy, your Honor. I'd like to make the record clear on that because I don't have it in my papers.

. . .

THE COURT: As a matter of law, the only question that that leaves is to some tribunal to decide whether that violates the CBA or not. That's the issue that has to be determined by this Court.

And I told you before, if it turns out that it doesn't violate the CBA, you win. If it turns out that it does violate the CBA, then the fact that you got a labor council opinion in New Jersey, that isn't binding on this Court because of the Hines case, which says that that grievance doesn't exist as a prerequisite to this Court deciding that issue on the merits.

MR. ALLENBY: All right. I tried my best to convince the Court, but --

THE COURT: Well, I appreciate your input and I understand what you're telling me. I just feel that that's what the law requires, and -- I must be masochistic because I'd love to trim this ship. I'd like to get rid of you. I'd like to get you the hell out of here. But --

MR. ALLENBY: Well, Fischbach and Moore would like to be out of here as quickly as possible.

THE COURT: I'm sure you would . . .. The order will deny the motion for summary judgment of Fischbach and Moore on the grounds that the administrative determination is not valid under the doctrine of Hines versus Anchor Freight, and that the issue of whether or not there was a breach of the CBA is before this Court de novo on the merits . . ..

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Mary Lebkuecher
Transcriber

Dated: 3-28-91

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B
Order on Summary Judgment
Nunc Pro Tunc to February 21, 1990

Defendant FISCHBACH & MOORE, INC.'s ("FISCHBACH") Motion for Summary Judgment on the Seventh and Thirteenth Causes of Action of the Second Amended Complaint and for sanctions came on for hearing before this court on February 20, 1990 at 10:30 A.M., the Honorable Rudi M. Brewster, presiding. Plaintiff MOORE appeared in propria persona. Norman R. Allenby appeared for Defendant FISCHBACH.

Proof having been made to the satisfaction of the Court and GOOD CAUSE APPEARING THEREFOR, IT IS ORDERED:

Defendant FISCHBACH & MOORE, INC.'s Motion for Summary Judgment on the Seventh Cause of Action for Breach of Contract IS DENIED on the grounds that:

1. The Federal District Court and the NLRB have concurrent jurisdiction to hear claims based on breach of a collective bargaining agreement.

2. FISCHBACH & MOORE and Corbin-Dykes are separate entities as to Local 569's inside agreement; and

3. The Seventh Cause of Action is not moot.

Defendant FISCHBACH & MOORE, INC.'s Motion for Summary Judgment on the Thirteenth Cause of Action for Breach of Contract IS GRANTED on the basis that Plaintiff the rate of pay to which he was entitled under the contract.

Plaintiff's FRCP 56(f) motion is DENIED as his declaration fails to raise an issue of fact as to the Thirteenth Cause of Action.

Defendant FISCHBACH & MOORE, INC.'s Motion for Sanctions pursuant to FRCP 11 is DENIED.

SO ORDERED.

FILED: MAR 6 1991

Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CASE NO. 87-0172-B
Amended Order on Summary Judgment
Nunc Pro Tunc to February 21, 1990

Defendant FISCHBACH & MOORE, INC.'s ("FISCHBACH") Motion for Summary Judgment on the Seventh and Thirteenth Causes of Action of the Second Amended Complaint and for sanctions came on for hearing before this court on February 20, 1990 at 10:30 A.M., the Honorable Rudi M. Brewster, presiding. Plaintiff MOORE appeared in propria persona. Norman R. Allenby appeared for Defendant FISCHBACH.

Proof having been made to the satisfaction of the Court and GOOD CAUSE APPEARING THEREFOR, IT IS ORDERED:

Defendant FISCHBACH & MOORE, INC.'s Motion for Summary Judgment on the Seventh Cause of Action for Breach of Contract IS DENIED:

Issues of fact exist as to whether FISCHBACH and Corbin-Dykes are separate entities as to LOCAL 569's Inside Agreement.

Defendant FISCHBACH & MOORE, INC.'s Motion for Summary Judgment on the Thirteenth Cause of Action for Breach of Contract IS GRANTED on the basis that Plaintiff the rate of pay to which he was entitled under the contract.

The court found, as a matter of law, that:

1. The Federal District Court and National Labor Relations Board have concurrent jurisdiction to hear claims based on breach of collective bargaining agreements; and

2. The Seventh Cause of Action is not moot.

Plaintiff's FRCP 56(f) motion is DENIED as his declaration fails to raise an issue of fact as to the Thirteenth Cause of Action.

Defendant FISCHBACH & MOORE, INC.'s Motion for Sanctions pursuant to FRCP 11 IS DENIED.

IT IS SO ORDERED.

FILED: MAR 21 1991 Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order Denying F & M's Motion for Summary Judgment on Plaintiff's Fifth Cause of Action

The above captioned matter came on regularly for hearing on February 25, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona, and Norman R. Allenby, Esq., and Dorothy J. Almour, Esq., appeared for defendant Fischbach & Moore. Upon consideration of Fischbach & Moore's motion for summary judgment on the fifth cause of action, and the oral argument thereon, the court hereby enters the following memorandum opinion and order.

FACTUAL AND PROCEDURAL BACKGROUND

On February 20, 1990, this court heard Fischbach & Moore's motion for summary judgment on the seventh cause of action of plaintiff's second amended complaint. That cause of action alleged that Fischbach & Moore provided employees to another signatory employer -- Corbin-Dykes -- without following the provisions of § 4 of the Inside Agreement, which provides certain procedures governing the hiring of employees from the out-of-work list. In its motion for summary judgment, Fischbach & Moore argued that jurisdiction over this cause of action rested with the National Labor Relations Board (NLRB), not the district court, and that Fischbach & Moore and Corbin-Dykes were one employer under the Inside Agreement.

In denying Fischbach & Moore's motion for summary judgment this court held that the federal district court and the NLRB have concurrent jurisdiction to hear claims based on the breach of a collective bargaining agreement, and that issues of fact remained as to whether Fischbach & Moore and Corbin-Dykes were separate entities for purposes of the Inside Agreement.

In the third amended complaint, the allegation against Fischbach & Moore now comprises the fifth cause of action, and has been slightly reformulated. However, the essential allegations are identical.

Fischbach & Moore now asserts that the present action against it is barred by *res judicata* in light of an adverse ruling suffered by the International Brotherhood of Electrical Workers ("IBEW") on an identical allegation before the Council on Industrial Relations for the Electrical Contracting Industry ("Council"). Fischbach & Moore alleges that plaintiff had brought a grievance against the IBEW in which plaintiff claimed that the IBEW had failed in its duty of fair representation by allowing Fischbach & Moore to transfer employees to Corbin-Dykes.[1] By letter dated August 24, 1990, counsel for the Local notified plaintiff that a grievance procedure had been commenced before the Labor-Management Committee ("Committee") in San Diego, pursuant to the Inside Agreement. Cooper Declaration, Exhibit B. The Committee deadlocked on the grievance, and forwarded it to the Council, which sits in Washington, D.C. Cooper Declaration, Exhibit C.

On November 15, 1990, the Council issued its ruling in favor of Fischbach & Moore, finding no violation of the referral procedure promulgated in § 4 of the Inside Agreement. According to the Council, "inasmuch as Fischbach & Moore signed documents stating they were responsible for all of Corbin-Dykes' debts and responsibilities, the Union properly regarded them as one employer for the purposes of Referral Procedure." Cooper Declaration, Exhibit G.

Plaintiff did not participate in any of these proceedings. In response to the notification letter from the Local's counsel, plaintiff wrote that "[a]ll such matters will now be litigated before the district court, and not before any 'Committee' as represented in your letter." Moore Declaration, Exhibit B.

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[1] Local Union 569 of the IBEW ("Local") and the IBEW, both defendants in the present case, have jointly filed a brief in support of Fischbach & Moore. As their only point of contention with Fischbach & Moore, the Local and the IBEW assert that this grievance was in fact filed against Fischbach & Moore, not the IBEW.

Throughout the arbitration process, plaintiff's position was purportedly asserted by the Local.

Plaintiff claims that he never filed a grievance against the Union or F & M. Factually, plaintiff's allegation is supported by the evidence before the court. Neither Fischbach & Moore nor any of the other defendants have produced any record of a grievance filed by plaintiff. In fact, the Declaration of Dick Smith states that "[t}he first notice that the Union had of Lawrence Moore and Walter Whelan's discriminatory dispatch issue was when I was served with the complaint in Case NO. 87-0172-B(M)." If Smith, as business manager of the Local, was unaware of any grievance filed by plaintiff, then the court infers that none was filed by plaintiff.

Regardless of whether plaintiff filed the grievance himself, Fischbach & Moore now claims that summary judgment is appropriate because the Inside Agreement states that arbitration is the sole and exclusive remedy for alleged violations of any section of that Agreement and the decision of the arbitrator is final and binding on all parties. Cooper Declaration, Exhibit A (Copy of Inside Agreement), §§ 1.04-1.06.

Section 1.06 (A-2) of the Inside Agreement provides that "these provisions shall be the sole and exclusive remedy for any claims or alleged violation of any Section of this Agreement or any grievances arising pursuant to any of the provisions of this Agreement." The same section continues: "The final decision of the grievances resolution bodies [the Committee and the Council] shall be final and binding upon all parties hereto, including the employees employed by employers, pursuant to the provisions of this Agreement."[2]

In addition to its *res judicata* argument, Fischbach & Moore asserts that plaintiff's claim is barred by a six-month statute of limitations on breach of contract claims contained in 29 U.S.C. § 160(b). Since plaintiff's complaint was filed in February, 1987, all breaches occurring before July, 1986 allegedly are not actionable. Plaintiff responds that the applicable statute of limitations is four years.

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[2] Section 1.06 (A-2) concludes by stating that any party who "initiates legal proceedings attacking . . . the final decision of an arbitration, appeals or appellate body established pursuant to this section . . . who is unsuccessful in such endeavor, shall pay the reasonable costs and attorney fees of the party prevailing in such action or litigation."

In addition to opposing the motion on the merits, plaintiff alternatively argues that summary judgment would be premature at this time under Fed. R. Civ. Proc. 56(f). Plaintiff has also moved for sanctions.

DISCUSSION

I. Summary Judgment Standard

In order to prevail on a motion for summary judgment, the moving party must establish that no material fact is in "genuine dispute" such that a "reasonable jury could not return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fuller v. Frank, 916 F.2d 558, 562 n. 6 (9th Cir. 1990).

II. Fischbach & Moore's Motion for Summary Judgment

A. The Finality Doctrine

As recognized by § 203 (d) of the Labor Management Relations Act ("LMRA") and the Supreme Court, arbitration provisions in collective bargaining agreements generally are final and district courts do not have the power to review the merits of arbitration rulings. See United States Steel Workers v. American Manufacturing Company, 363 U.S. 564 (1960); United States Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United States Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) ("Steel Workers Trilogy"); A T & T Technologies v. Communications Workers, 475 U.S. 643, 648 (1985) (reaffirming Steel Workers Trilogy).

As described above, the evidence presented to the court suggests that plaintiff did not file a grievance attacking the hiring procedures of Fischbach & Moore. Fischbach & Moore argues that this is immaterial because the Local and Fischbach & Moore properly brought the issue to the Committee under § 301 of the LMRA, since the question involved contract interpretation. According to Fischbach & Moore, grievances under the Inside Agreement are not initiated by individual members; rather, such grievances are initiated by the Local Union or the local National

Electrical Contractors Association chapter. In whatever manner the arbitration process is initiated, it is asserted that the individual's lack of participation "does not affect the binding nature of the decision." See Mosely Declaration, para. 20.

If this case presented a typical union-employee-employer relationship, Fischbach & Moore's argument on this point would be persuasive. Because plaintiff, as a member of the Union, is a signatory to the Inside Agreement, it is clear that his participation is not necessary in order for the arbitrator to render a final, non-appealable decision on this issue.

However, where the union does not fairly represent the employee against the employer, the finality doctrine of Steel Workers Trilogy does not apply. Hines v. Anchor Motor Freight, 424 U.S. 554, 563 (1975). In Hines v. Anchor Motor Freight, 424 U.S. 554, 563 (1975). In Hines, union truck drivers were allegedly discharged without cause by their employer. Id., at 556-57. The union took the matter to the arbitration committee, but failed to competently investigate or present the drivers' defense. Id., at 559-60 n. 4. The discharge was upheld by the arbitration committee. Id., at 557-58. The district court dismissed the drivers' complaint because of the finality doctrine, Id., at 559, and the Court of Appeals affirmed. Id., at 560.

In reversing, the Supreme Court held:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract.

Id., at 567. By so holding, the Court explicitly rejected the policy argument urged by the employer, who reasoned that "the employer must be protected from relitigation by the express contractual provision declaring a decision to be final and binding." Id., See also Vaca v. Sipes, 386 U.S. 171, 186 (1967) (employer may not insist on exhaustion when union has breached its representation duty in processing grievance). This court recognizes the employer's policy argument in Hines as being identical to that asserted by Fischbach & Moore in this case.

The Ninth Circuit, in considering the finality doctrine where the union has unclean hands, has held:

> To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation.

Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

B. Finality in this Case

Fischbach & Moore's efforts to distinguish Hines and its progeny are unpersuasive. Fischbach & Moore argues that each of the cases cited above, as well as some others cited by plaintiff, involve suits against employers in which the employee is seeking to preserve "uniquely personal" rights encompassed by § 301. As examples of such rights, Fischbach & Moore notes that the Supreme Court in Hines mentioned wages, hours, overtime pay, and wrongful discharge.

In this case, Fischbach & Moore argues that plaintiff is asserting a mere contractual right under the Inside Agreement. Fischbach & Moore's position creates a distinction without a difference. Plaintiff is suing the employer for breach of the collective bargaining agreement. If plaintiff is improperly relegated to the out of work list because of Fischbach & Moore's conduct, then plaintiff's asserted right falls squarely within those contemplated by Hines, regardless of the semantic labels Fischbach & Moore wishes to attach to that right.[3]

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[3] If Fischbach & Moore's position were correct, then no remedy would exist for an employee unfairly represented by his or her union where the arbitration dispute involved "contractual" rights. Accepting Fischbach & Moore's position, this court would be forced to conclude that no matter how egregious the union's lack of representation, the "safety net" created by Hines would not be available simply because of the label attached to the right. This court declines to accept this reading of Hines.

In order to avail himself of the protection afforded by Hines in resisting a motion for summary judgment, plaintiff must demonstrate that a genuine issue of material fact exists as to whether the union's breach of duty "seriously undermines the integrity of the arbitral process . . ." Hines, 424 U.S. at 567. The parties have focused on the impartiality of the Committee and the Council, without reference to the relationship between the Local and plaintiff. See Opposition Brief, pp. 7-13; Reply Brief, pp. 7-12. By so doing, Fischbach & Moore and plaintiff have ignored the crucial issue under Hines. The issue is not the partiality or corruptness of the Council and the Committee; rather,the issue is whether plaintiff, as a member of the Local allegedly injured by Fischbach & Moore's transfer practices, was fairly represented by the Local in the administrative process. If not, then the finality doctrine does not apply.

This court finds that a genuine issue of material fact exists as to whether a conflict of interest existed between plaintiff and the Local, such that the Local did not represent plaintiff's position fairly before the Committee and the Council. Specifically, the participation of the current Local business manager Tom Pridemore may have tainted the arbitration proceeding. Pridemore, who is a defendant in the present action, submitted a declaration to this court in support of Fischbach & Moore's earlier motion for summary judgment. In that declaration, Pridemore verified certain business records of Fischbach & Moore, and concluded: "Therefore, Fischbach & Moore, Inc. and Corbin-Dykes Electric are one employer for the purposes of the hiring hall agreement." Cooper Declaration, Exhibit D (Pridemore Declaration contained therein).[4]

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[4] Fischbach & Moore attempts to limit the impact of this declaration by stating that it was purely an evidentiary vehicle, but did not "state any position either 'for' or 'against' Plaintiff Moore." This statement is incorrect. As noted above, Pridemore concluded in his declaration that F & M and Corbin-Dykes were one entity, a position which is directly contrary to Moore's claim in this lawsuit and the purported position of the Local in the arbitration process.

However, once this court ruled against Fischbach & Moore, and the arbitration process began, Pridemore became the Local's (and therefore plaintiff's) advocate in attacking the hiring practices of Fischbach & Moore. In the Labor-Management Committee hearing, Pridemore sat as a union representative, as did two other defendants in this case. More importantly, when the issue went to the Council, Pridemore signed the Local's brief and appeared for the Local at the hearing. Cooper Declaration, Exhibits E, G.

Given the history of this case, the court concludes that an issue of fact remains as to the Local's fulfillment of its duty of fair representation.[5] Accordingly, the Hines exception may apply to this case and preclude Fischbach & Moore from relying on the finality doctrine enunciated in Steel Workers Trilogy. Therefore, Fischbach & Moore's motion for summary judgment on this ground must be denied.

C. Statute of Limitations

Fischbach & Moore asserts in the alternative that a breach of contract claim against an employer must be brought within six months under 29 U.S.C. § 160(b). Plaintiff argues that the relevant statute of limitations
is four years, pursuant to California law. Both sides cite DelCostello v. Teamsters, 462 U.S. 151 (1983), in which the Court held that in the absence of an applicable federal statute of limitations, courts should apply the most closely analogous statute of limitations under state law. In DelCostello, the employee's

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[5] The court takes judicial notice of the evidence received during the trial in Civil Case No. 85-1719-B. Accordingly, the court recognizes the long running dispute between plaintiff and the Local, a dispute which has now been before this court for more than five years. Although this court is not in a position to quantify the effect of this dispute on the ability of the Local to oppose Fischbach & Moore on plaintiff's behalf in an arbitration context, the court observes that the deterioration of the relationship between plaintiff and his union raises serious questions as to whether the finality doctrine should be imposed on plaintiff.

suit sought to vacate an arbitration award, and the Court found that there was no closely analogous state statute of limitations. Id., at 166-68. Accordingly, the Court applied the six-month statute of limitations provided by § 10(b) of the National Labor Relations Act. Id., at 171. However, where the suit is for breach of the collective bargaining agreement against the employer, the Court applies the state statute of limitations for breach of contract. See Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966).

In this case, while an arbitration award is involved, plaintiff's cause of action against Fischbach & Moore, unlike the complaint in DelCostello, does not seek to vacate the arbitration award. Rather, plaintiff is alleging violation of the collective bargaining agreement by the employer, as in Hoosier Cardinal. Therefore, the California breach of contract statute applies, and Fischbach & Moore's motion for summary judgment on this ground must be denied.

III. Discovery and Evidentiary Disputes

Because the court has reached its ruling based only upon the evidence and declarations cited in this memorandum opinion, the court need not reach the various evidentiary issues asserted by the parties. Moreover, plaintiff's argument under Rule 56(f) is moot since the motion for summary judgment has been denied on the record presently before the court.

IV. Sanctions

Plaintiff requests sanctions against counsel for Fischbach & Moore. No good cause appearing, the motion is denied.

IT IS SO ORDERED.

FILED: MAR 20, 1991

Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order To Show Cause Re Contempt

TO DEFENDANT FISCHBACH & MOORE, INC. AND ITS ATTORNEYS OF RECORD:

Defendant FISCHBACH & MOORE, INC. and its attorney of record are hereby ordered to appear before the Honorable RUDI M. BREWSTER on March 25, 1991 at 10:30 A.M. to show cause why an Order should not be issued finding Defendant in contempt of a previous Order of this Court, dated February 16, 1990, ordering Defendant to produce documents and things as soon as possible but within thirty days from February 14, 1990. By that Order the Court also took under submission Plaintiff's request for sanctions and costs, including $690.00 of attorneys fees previously incurred.

FILED: MAR 4 1991

Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order Referring Hearing On Order To Show Cause Re Contempt To Magistrate Judge

The above captioned matter came on for hearing in March 25, 1991 before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria personal, and Norman R. Allenby, Esq., and Dorothy J. Almour, Esq., appeared for defendant Fischbach & Moore. Upon consideration of the order to show cause, and the supporting and opposing briefs, it is hereby ordered:

1. This contempt proceeding is referred to the assigned magistrate judge, who shall conduct a hearing and issue appropriate recommendations. The hearing before the magistrate judge should be scheduled as expeditiously as the magistrate judge's calendar allows.

2. This contempt proceeding is consolidated with the prior contempt proceeding heard by the magistrate judge on October 12, 1990, and November 5, 1990. The court notes that no final order or recommendation was issued by the magistrate judge during the earlier proceeding, and that the discovery dispute has continued unabated since that time.

3. The trial date of April 16, 1991 remains in effect.

IT IS SO ORDERED.

FILED: MAR 28 1991

Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order Referring Matter
To Magistrate Judge

The court is in receipt of plaintiff's Second supplemental Ex Parte Memorandum of Points and Authorities in Support of an Order to Show Cause re Contempt for Destruction of Evidence and Deliberate Withholding of Evidence, filed on April 15, 1991, and plaintiff's Supplemental Ex Parte Memorandum of Points and authorities in Support of Order to Show Cause re Contempt Against Fischbach & Moore, Inc., Norman Allenby and Dorothy Almour, filed April 22, 1991. Consistent with this court's orders of March 28, 1991, and April 3, 1991, and for the reasons stated therein, these matters are hereby referred to Magistrate Judge McCue for appropriate action.

IT IS SO ORDERED.

FILED: APR 23 1991

Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order Affirming Magistrate Judge's Order; Bifurcating Trial; Granting in Part and Denying in Part Motion for Summary Judgment by Defendant IBEW; Granting in Part and Denying in Part Motion for Summary Judgment by Defendant Local 569

The above captioned matter came on regularly for hearing on April 1, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of Electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); and Norman R. Allenby, Esq., and Dorothy J. Almour, Esq., appeared on behalf of defendant Fischbach & Moore (F & M). Upon consideration of the supporting and opposing briefs, and the oral argument thereon, the court hereby enters the following order.

. . .

II. Motion for Separate Trial by F & M

The court finds that the fifth cause of action against defendant F & M is sufficiently independent from plaintiff's other causes of action that bifurcation is warranted. Subject to change as future events may warrant,[1] the court will bifurcate the trial so that the fifth cause of action against F & M will proceed first before the jury, after which the jury shall return a verdict on that cause of action only, followed by the remainder of the case against Local 569 and the IBEW before the same jury.[2]

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[1] The court notes that F & M has filed a motion for reconsideration of the order denying summary judgment in its favor, and a new motion for dismissal based upon plaintiff's alleged lack of standing. Concurrently, plaintiff is seeking leave to amend his third amended complaint (TAC) in order to expand the scope of his allegations against F & M.

III. Motion for Summary Judgment by IBEW

A. First Cause of Action: Duty of Fair Representation

The IBEW argues that plaintiff can only bring this claim against Local 569, since the latter defendant is the exclusive bargaining representative of the union members. The law is clear that "[a]n international or regional affiliate of a local union may not be liable for the local's unfair labor practices merely by virtue of its affiliation with the local." Abreen Corp. v. Laborers' Int'l Union, 709 F.2d 748, 757 (1st Cir. 1983), cert. denied, 464 U.S. 1040 (1984). As the First Circuit has held in applying § 301 of the Labor Management Relations Act (LMRA):

> A plaintiff seeking to place liability on an international for a local's allegedly illegal conduct must further show that the local acted as the international's agent or that the international independently participated in the unlawful conduct.

Boroweic v. Local No. 1570, 889 F.2d 23, 26 (1st Cir. 1989) (citing Abreen, 709 F.2d at 757, and Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 213-17 (1979).

In response to the general rule, plaintiff posits [a] factual assertion: (1) the IBEW has a veto power over all local union contracts.

In responding to the Barry Declaration, plaintiff has relied almost exclusively on conclusory allegations. Plaintiff has not supplied this court with any tangible evidence, e.g., deposition excerpts or documents, suggesting that the IBEW engaged in affirmative conduct or unreasonably meddled in the Local's affairs with respect to plaintiff and his fair representation claims.

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[2] The court recognizes the reciprocal impact the bifurcated trials may have on each other, e.g., if F & M's transfer policy does not constitute a breach of the Inside Agreement, then a fortiori the Local did not breach its duty of fair representation in failing to protect its members from said policy. Such impacts shall be managed by the court as they arise, and do not outweigh the prejudice which F & M will endure if the case is not bifurcated.

Based upon all of the above, the IBEW's motion for summary judgment on the first cause of action is granted.

. . .

D. Seventh Cause of Action: Breach of Contract

This court has jurisdiction under § 301(a) of the LMRA over a suit brought by a union member against an international union for violation of the union constitution. Kinney v. Int'l Brotherhood of Elec. Workers, 669 F.2d 1222, 1229 (9th Cir. 1982). The individual IBEW defendants argue that no provision of the IBEW Constitution creates contractual liability. Plaintiff cites Article XXII, Section 3, and Article XXVII, Section 1, of the IBEW Constitution. See Complaint, para. 231. The court finds that triable issues of fact remain as to the liability of the individual IBEW defendants under the relevant articles, and the vicarious liability of the IBEW for the conduct of those individual defendants.[5]

E. Eighth Cause of Action: Violation of § 609 of LMRDA

Section 609 of the LMRDA states that it shall be unlawful for any labor organization "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter." The phrase "otherwise discipline" refers "only to actions 'undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership.'"

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[5] The IBEW's reliance on Teamsters Local 420 v. Traweek, 867 F.2d 500, 508, is misplaced. In Traweek the Ninth Circuit only considered a suit against two non-officer members, where the plaintiffs eschewed the internal grievance process. In finding that the district court did not have subject matter jurisdiction, the court in Traweek did not foreclose suits for declaratory relief against union officers in their official capacities, as in this case.

Breininger v. Sheet Metal Workers Intern., 110 S.Ct. 424, 439 (1989) (quoting Miller v. Holden, 535 F.2d 912, 915 (5th Cir. 1076)).

In this case, the IBEW asserts that plaintiff is only charging individual retaliation, as opposed to the improper use of the union's formal discipline machinery. However, plaintiff's eighth cause of action does not refer to ad hoc retaliation, but instead to official conduct which led to his suspension and expulsion. TAC, para 249. Therefore, the motion for summary judgment on the eighth cause of action is denied.

IV. Local 569's Motion for Summary Judgment

A. First Cause of Action: Duty of Fair Representation

1. Count 1: The Hiring Hall

In count 1, plaintiff charges a variety of breaches of the duty of fair representation which relate to Local 569's administration of the hiring hall.

. . .

3. Count 4: Ratification of Collective Bargaining Agreements

In the context of the collective bargaining process, the duty of fair representation is breached only if the disputed union procedures are wholly irrational or arbitrary. Airline Pilots Association v. O'Neill, __ U.S. __, 91 DAR 3211, 3214 (March 19, 1991). According to Local 569, since the mail ballot was conducted in accordance with the IBEW Constitution and for a legitimate union interest, this claim must be dismissed as a matter of law. However, plaintiff's countervailing evidence establishes sufficient irregularity to create a genuine issue of material fact. Moore Declaration, para. 27 (ruling by Robbins concerning return addresses).

With respect to plaintiff's charges concerning the 1987 amendment to the prior Agreement, there is also a triable issue of fact. Even if Barry properly delegated the authority to implement the amendment, the court is not convinced that the delegates exercised it properly. Accordingly, the motion for summary judgment on count 4 is denied.

. . .

5. Count 6: F & M's Transfer Policy

Plaintiff originally complained about F & M's transfer policy on March 1, 1988. Defendants assert that under the six month statute of limitations, plaintiff's complaint can only reach back to October 1, 1987. Therefore, defendants argue that plaintiff must show damage between October 1, 1987, and the cessation of the transfer policy, which he cannot do because he was not even on the List during this period.

At the hearing, the court requested additional factual briefing on the standing issue, and this aspect of the Local's motion for summary judgment is accordingly taken under submission.[6]

B. Second Cause of Action: Prima Facie Tort, or Blacklisting, and Ninth Circuit Cause of Action: Intentional Infliction of Emotional Distress

Like the IBEW, the Local defendants argue that these claims are preempted by the LMRA. However, while the IBEW claimed preemption under § 10(a) of the LMRA, the Local is asserting preemption under § 301 of the LMRA, which is appropriate as Local 569 is a signatory to the collective bargaining agreement at issue.

Under Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-13 (1985), § 301 preempts any state claims which could only be resolved by reference to a collective bargaining agreement.

Where the terms of a collective bargaining agreement govern job security or employment opportunities, any state tort claim intertwined with those provisions is preempted. Jackson v. Southern California Gas Co., 881 F.2d 638, 643 (9th Cir. 1989). This circuit has recently held that the preemptive effect of § 301 is negated only when the right asserted would exist even in the absence of a collective bargaining agreement, e.g., "[t]he nonnegotiable right not to be discharged for filing a workers' compensation [claim] . . .." Eldridge v. Felec Services, Inc., 920 F.2d 1434, 1438 (9th Cir. 1990).

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[6] The standing issue is also the basis of a new motion to dismiss filed by F & M. See supra n.1.

Under this authority, plaintiff must establish that his claims in the second and ninth causes of action are wholly unrelated to the collective bargaining agreement (Agreement).[7] Clearly, each one of plaintiff's allegations relate in some way to the Agreement and the defendants' administration and alleged manipulation of said Agreement. The allegations of blacklisting and emotional distress all have their genesis in improper conduct under the Agreement. Therefore, these claims are preempted.[8]

Where claims are preempted by § 301, they must be dismissed unless plaintiff has exhausted his contractual grievance. procedures. Jackson, 881 F.2d at 646. However, the employee "may obtain judicial review of his claim despite his failure to exhaust contractual remedies if he can show that the union breached its duty of fair representation." Id. (citing Vaca v. Sipes, 386 U.S. 171, 185-86 (1967)). Here, there is a genuine issue of material fact as to whether Local 569 breached this duty. See supra pp. 10-15. Therefore, although these claims are preempted by § 301, preemption does not prevent this court from hearing plaintiff's claims. Accordingly, Local 569's motion for summary judgment is denied on the second and ninth causes of action.[9]

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[7] Plaintiff's alternative argument, that his blacklisting tort claim may be considered improper "discipline" under the LMRDA, is foreclosed by Breininger, 110 S.Ct. at 440 (informal "blacklisting" and other ad hoc practices do not constitute "discipline" under the LMRDA).

[8] Plaintiff is unpersuasive in his discussion of pendent jurisdiction, which does not apply where claims are preempted. Plaintiff's citation to Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 999 (9th Cir. 1987), is taken out of context, as the court's decision considered pendent jurisdiction over tort claims in the § 301 context only insofar as removal was concerned. Indeed, among the rationale supporting the exercise of pendent jurisdiction was "the significant federal interest in deciding the preemption defense." Id. (emphasis supplied).

[9] The court finds that this holding is not inconsistent with the court's holding on the IBEW's motion for summary judgment on the second

. . .

F. Seventh Cause of Action: Breach of Contract versus Individual Union Officers

The court in Traweek did not foreclose suits under § 301 for injunctive and declaratory relief against union officers in their official capacities. See supra n. 5 and accompanying text. Accordingly, the motion for summary judgment on the seventh cause of action is denied.

IT IS SO ORDERED.

FILED: MAY 2 1991

Rudi M. Brewster
DISTRICT COURT JUDGE

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and ninth causes of action, as the latter ruling did not implicate the duty of fair representation owed by the Local. Indeed, the court held that the IBEW is not under a duty of fair representation to plaintiff. See supra pp. 3-4. With respect to the IBEW, plaintiff's preempted claims are within the exclusive jurisdiction of the NLRB under § 10(a), and plaintiff has not made any allegations suggesting that his pursuit of grievances under § 10(a) would be futile.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order Dismissing Plaintiff's Objection to Order of Magistrate Judge; Denying Plaintiff's Motion to Amend and for Class Certification; Granting Defendants' Motion for Protective Order; Dismissing Plaintiff's Notice of Default of J.J. Barry; Denying Defendant Fischbach & Moore's Motion for Reconsideration; Granting in Part and Denying in Part Defendant Fischbach & Moore's Motion to Dismiss.

The above captioned matter came on regularly for hearing on May 28, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of Electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., and Jennifer T. Messersmith, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); Oscar F. Irwin, Esq., and Craig A. Brown, Esq., appeared on behalf of defendant Fischbach & Moore (F & M); and John C. Nangle, Esq., appeared for the Department of Labor. Upon consideration of the various motions filed, and the oral argument thereon, the court hereby enters the following order.

. . .

II. Plaintiff's Motion to Amend and for Class Certification

Under Fed. R. Civ. Proc. 15, leave to amend "shall be freely given when justice so requires." In deciding whether an amended complaint should be allowed, this court considers four factors: (1) undue delay; (2) bad faith of the moving party; (3) futility of the amendment; and (4) prejudice to the opposing party. Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). While all of the factors mitigate against allowing the proposed amendments, the first and fourth factors are particularly compelling on the facts of this four year old case, in which plaintiff has already amended three times. Accordingly, the motion to amend the third amended complaint is hereby denied.

Under Fed. R. Civ. Proc. 23, plaintiff has not met his burden in seeking class certification. Plaintiff has not demonstrated (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Accordingly, the motion for class certification is hereby denied.

. . .

IV. Plaintiff's Notice of Default of J.J. Barry

By order entered July 5, 1989, this court dismissed the second amended complaint against defendant J.J. Barry for lack of personal jurisdiction. In so doing, the court did not differentiate between the various causes of action asserted against Barry, but rather ruled globally with respect to all allegations against Barry in the second amended complaint. Because this court lacks personal jurisdiction over Barry, the notice of default filed by plaintiff against Barry is dismissed.

V. F & M's Motion for Reconsideration

By order entered March 26, 1991, this court denied F & M's motion for summary judgment, primarily on the ground that the "finality" doctrine generally applicable to arbitration decisions does not apply in this case. See Order, March 26, 1991, pp. 2-11. In that order, the court also denied the statute of limitations defense asserted by F & M, finding that the period applicable to a breach of contract claim against the employer is four years. In so doing, the court relied primarily on Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966) (where employer breaches collective bargaining agreement, state statute of limitations for breach of contract applies). Cf. DelCostello v. Teamsters, 462 U.S. 151, 161 (1983) (six month statute provided by § 10(b) of the National Labor Relations Act applies).

F & M's motion for reconsideration is based upon Conley v. Int's Brotherhood of Electrical Workers, 810 F.2d 913 (9th Cir. 1987), where the court considered the interplay between Hoosier Cardinal and DelCostello in cases where a plaintiff sues both the employer and his or her union. The Ninth Circuit concluded that in such "hybrid" cases the six-month statute of limitations provided by § 10(b) should apply.

Under Conley, plaintiff's claim is clearly a hybrid action. Therefore, contrary to the court's earlier ruling, Conley requires an application of the six-month statute of limitations to plaintiff's claim against F & M. Thus, the only question on reconsideration is whether application of the six-month period is fatal to plaintiff's claim against F & M. In a letter dated March 1, 1988, plaintiff states that he "just learned" of F & M's transfer policy. Almour Declaration, Exh. B. Plaintiff's first amended complaint, filed on September 29, 1988, names F & M as a defendant for the first time. Therefore, F & M argues that the claim is time-barred.

However, F & M fails to note that plaintiff filed his motion to amend on May 13, 1988, as reflected in the court docket. Moreover, the official court file contains a lodged copy of plaintiff's first amended complaint, also dated May 13, 1988, which for the first time names F & M as a defendant because of its transfer policy. Therefore, even under the six-month statute of limitations, plaintiff's claim against F & M is not time-barred.[1] Accordingly, the motion for reconsideration is denied, except insofar as the court will apply the six-month statute of limitations to plaintiff's hybrid claims.

VI. F & M's Motion to Dismiss for Lack of Standing

On April 1, 1991, this court requested additional briefing on the issue of plaintiff's standing to sue F & M. Plaintiff was terminated from F & M on May 8, 1986, and was returned to the out-of-work list (List). On May 4, 1987, plaintiff's name was removed from the List, allegedly because he was "doublebooking," i.e., working in another district while maintaining his position on Local 569's List. From the date of his removal, plaintiff lacks standing to assert his breach of contract claim against F & M, as plaintiff was not available for hiring after his removal from the List. While that removal may constitute a breach by the Local of its duty of fair representation, see Order, May 2, 1991, pp. 10-11, it was not accomplished with the complicity of F & M. Accordingly, F & M cannot be held accountable for breach of contract after May 4, 1987.

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[1] F & M also notes that plaintiff, by letter dated November 11, 1987, complained about the transfer of certain employees from F & M to Dynalectric. However, this charge reflects plaintiff's dissatisfaction with an isolated transfer, and does not suggest knowledge or notice of the transfer policy of F & M as is related to Corbin-Dykes. It is that policy which forms the basis of the fifth cause of action.

With respect to the period between May 8, 1986, and may 4, 1987, the evidence presented to the court indicates that plaintiff was on the List in a position where he was eligible to accept calls on those dates when F & M transferred to Corbin-Dykes. See Almour Declaration, Exh. C; Pridemore Declaration, Exh. A; Brownfield Declaration, Exh. A. However, on each of the relevant dates plaintiff passed on calls which were made available to him by other employers. Almour Declaration, Exh. A. From this evidentiary fact, F & M concludes that plaintiff would also have rejected any calls to work for Corbin-Dykes, had such calls been made.

The court declines to accept this interpretation. Plaintiff's reluctance to accept some calls, or even all calls, does not necessarily mean that he would have passed on a call from Corbin-Dykes during the relevant time frame. Accordingly, the motion to dismiss is denied with respect to the period between May 8, 1986 and May 4, 1987.

IT IS SO ORDERED.

FILED: JUN 5 1991

Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order Re Motions for Reconsideration and Motions in Limine.

The above captioned matter came on for hearing on June 6-7, and June 11, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); Oscar F. Irwin, Esq., and Craig A. Brown, Esq., appeared on behalf of defendant Fischbach & Moore (F & M). Upon consideration of the various motions filed, and the oral argument thereon, the court hereby enters the following order.

I. Plaintiff's Motion for Reconsideration

Plaintiff's motion for reconsideration amounts to nothing more than reargument of issues already passed upon by this court. Because the court finds no good cause for reconsidering its previous rulings granting partial summary judgment to the IBEW and the Local, plaintiff's motion is hereby denied in its entirety.

II. IBEW's Motion for Reconsideration

A. Third Cause of Action, Count 5: LMRDA Violations (Building Trades Assessment and Proposed Bylaw Amendments)

. . .

The court previously granted summary judgment to the IBEW on all counts of plaintiff's third cause of action except for count 5. See Order, May 2, 1991, pp. 6-8.

. . .

In conformance with this court's earlier rulings, see Id. at p.

7, this court will not impose broad agency liability on the IBEW.

. . .

Similarly, the court is also satisfied that summary judgment is appropriate with respect to plaintiff's allegations concerning the IBEW's role in consideration of his five proposed bylaw amendments. First, although plaintiff was initially prevented from reading the proposed bylaw amendments at two membership meetings, it is undisputed that IBEW President Barry personally remedied this conduct by directing IBEW Vice-President McCann to order Local 569 to permit the proposed amendments to be lawfully considered by the membership, and three were passed.[1] Accordingly, the court finds that this episode does not provide a cause of action against the IBEW under the LMRDA.

. . .

[T]he veto by IBEW President Barry of the remaining two bylaw amendments was not unreasonable and was within his authority under the IBEW Constitution.[2] Accordingly, summary judgment is granted to the IBEW on any claims arising from Barry's veto of these two amendments.

B. Seventh Cause of Action: Breach of Contract

. . .

Moreover, IBEW President Barry acted within his constitutional authority in refusing to approve the three bylaw amendments proposed by plaintiff and approved by the membership. Accordingly, these allegations do not give rise to a cause of action for breach of the IBEW Constitution.

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[1] The court recognizes that by the time the proposed amendments were considered, plaintiff had been suspended from the Local based upon unrelated internal union charges. However, the court is unaware of any authority suggesting that a union member has a personal right to champion or sponsor a proposed bylaw amendment which is otherwise lawfully considered, voted upon, and passed. The court reserves comment on the issue which would arise if plaintiff's suspension had simultaneously caused the removal of his proposed amendments from any consideration whatsoever by the membership.

[2] These amendments involved vacation time for certain union officers and written notice for union meetings in which collective bargaining agreement proposals would be discussed.

However, summary judgment is not appropriate with respect to the IBEW's alleged failure to "pass upon and determine" plaintiff's charges against Local officers. See IBEW Constitution, Art. 27, § 9. If the court were to accept the narrow interpretation of this section offered by the IBEW, then the IBEW would enjoy de facto sovereign immunity for any and all action it takes, or refuses to take, in responding to a union member's charge, no matter how egregious such action or inaction may be.[3] The plain language of Article 27 requires the court reject this interpretation. Instead, plaintiff shall be permitted to attempt to prove to the jury that the IBEW breached its own Constitution by refusing to investigate and consider his charges in good faith.[4]

C. Eighth Cause of Action: Violation of § 609 of the LMRDA

Upon reconsideration of the facts surrounding this cause of action as it relates to the IBEW, the court concludes that summary judgment should have been granted in the IBEW's favor. To the extent plaintiff alleges discipline of the type recognized under Breininger v. Sheetmetal Workers, 110 S.Ct. 424 (1989), this cause of action lies against the Local, not the IBEW.

Based upon all of the above, plaintiff shall proceed to trial against the IBEW on the seventh cause of action only, as more specifically described above.

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[3] Reducing the argument to its most obvious hypothetical level, the IBEW would have the court believe that no actionable breach of contract would occur if the International Vice-President, in the course of fulfilling his duties under Article 27, § 9, conducted a completely fraudulent investigation of a member's charges against a local officer. The court simply cannot accept this result.

[4] If plaintiff can demonstrate collusion between the IBEW and the Local with respect to his internal charges, then those facts may give rise to additional causes of action against the IBEW.

III. Statute of Limitations on Breach of Contract Claim

The court has previously ruled that it would apply a six-month statute of limitations to plaintiff's breach of contract claim against F & M. See Order, June 5, 1991, p. 4 (citing Conley v. Int's Brotherhood of Electrical Workers, 810 F.2d 913 (9th Cir. 1987)). The court concludes that this time bar applies only to plaintiff's filing of the complaint after discovery of the wrongful conduct. In other words, the six month period runs forward from the date of discovery, preventing unjust delay once a plaintiff discovers a claim.[5]

Contrary to the assertions of defendants, however, the six-month period does not also reach back from the date of discovery, thereby limiting a plaintiff to six months worth of damages. If defendants' position were correct, then a completely reasonable and justified failure to discover a contractual breach would bar a plaintiff from recovering his lawful damages for more than a six-month period in all cases. This is clearly not the state of the law. Rather, a plaintiff who satisfies the statute with respect to the filing of the complaint is not barred by the same statute from reaching back to sue for breaches which occurred more than six months prior to discovery.

. . .

V. Fischbach & Moore's Motions in Limine

With respect to plaintiff's claim for breach of the Inside Agreement against F & M, plaintiff shall not comment on any alleged collusion between the IBEW and/or Local defendants and F & M. In addition, plaintiff shall not comment on the debarment of F & M from any federal contract work. Even assuming arguendo that plaintiff's theories concerning motive are correct, the fact remains that motive is not an element of a breach of contract claim against an employer. The court intends this prohibition to be broad in its reach, and plaintiff is urged to refrain from attempting to devise clever or subtle mechanisms designed to place any such evidence or commentary before the jury.

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[5] The court has already ruled that plaintiff filed his complaint in a timely fashion. Order, June 5, 1991, pp. 4-5.

VI. Plaintiff's Motions in Limine

Plaintiff's motions in limine are denied without prejudice to the extent they become relevant during trial. The court is ruling in this manner because it cannot infer from plaintiff's conclusory arguments any valid reason for excluding any of the subject evidence.

VIII. General In Limine Rulings

In response to certain general evidentiary and procedural matters raised by the parties and not discussed above, the court hereby enters the following rulings: (1) the court shall conduct all voir dire; (2) evidentiary disputes arising out of alleged discovery failures or witness list omissions shall be handled on an objection by objection basis, but time charges shall be imposed against the losing party; (3) events which occurred after July, 1985 and were not litigated in the first trial shall be admissible in this trial to the extent they are otherwise relevant.

IT IS SO ORDERED.

FILED: JUL 16 1991 Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Order Denying Fischbach & Moore's Motion for Summary Judgment

Nunc Pro Tunc to July 19, 1991

After three days of trial in the above captioned matter, the evidence presented by plaintiff indicated that the cause of action against defendant Fischbach & Moore (F &M) may be vulnerable to summary adjudication pursuant to Bowen v. United States Postal Service, 459 U.S. 212 (1983). Upon consideration of this proposition, and the oral argument thereon, the court orally granted summary judgment in favor of F & M. However, upon further consideration of the issue, the court hereby rescinds its oral ruling and denies F & M's motion for summary judgment.

In Bowen, plaintiff Bowen was terminated from his position with the United States Postal Service (Service) after an altercation with another employee. Id. at 214. Although Bowen filed a grievance with his union contesting his termination, the union declined to take his grievance to arbitration. Id. Now dissatisfied both with his employer and his union, Bowen filed suit in district court alleging unlawful termination against the Service and a breach of the duty of fair representation against the union. Id.

With respect to the apportionment of damages as between the Service and the Union, the Court held:

> It is true that the employer discharged the employee wrongfully and remains liable for the employee's backpay. The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages.

Id. at 223 (citation and footnote omitted).

In so holding, the Court created an apportionment rule pursuant to which the employer is responsible only for those damages incurred by the employee through the date of the arbitration award which would have occurred had the union pressed the employee's case in good faith. The union is responsible for the increased damages which are incurred from the date of the tainted arbitration decision through judgment in the district court.

In explaining the rationale underlying its ruling, the Court stated,

> "Just as a nonorganized employer may accept an employee's waiver of any challenge to his discharge as a final resolution of the matter, so should an organized employer be able to rely on a comparable waiver by the employee's exclusive representative."

Id. at 226.

Applying this rationale to the instant matter, the court was concerned that Local 569's acquiescence in F & M's transfer policy, prior to the raising of any complaint by plaintiff, constituted the type of "waiver" discussed above. If this interpretation were correct, the employer would be absolved from all liability, and plaintiff's cause of action would stand only against his union.

However, Bowen explicitly recognized that "this is not a situation in which either the union or the employer has participated in the other's breach." Id. at 223, n.11 (citing Vaca v. Sipes, 386 U.S. 171, 197 n.18). In the passage cited from Vaca, the Court, relying on relevant N.L.R.B. authority, noted that in such situations the employer and the union would be held jointly and severally liable.

As this language clearly indicates, Bowen does not wholly excuse an employer's breach of the collective bargaining agreement, even where the union participated in or endorsed the breach. Instead, Bowen and its "waiver" discussion apply only in the context of post-grievance liability apportionment. Because this is a case in which the employer and the union concede that the transfers were made with the union's approval, the employer and the union are jointly and severally liable for any § 301 breaches arising out of the transfer policy prior to the arbitration decision. This analysis assumes that plaintiff can prove that the arbitration decision was tainted by the Local's breach of the duty of fair representation.

Accordingly, F & M's motion for summary judgment is hereby denied.

IT IS SO ORDERED.

FILED: AUG 7 1991

Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

JUDGMENT

This action came on for Trial before the Court and a jury, Honorable Rudi M. Brewster, District Judge, Presiding. The issues having been duly tried, and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant Fischbach & Moore, Inc. recover from the Plaintiff, Lawrence Moore, its costs of action.

FILED: AUG. 23, 1991 Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Judgment on Special Verdict in Favor of Defendant IBEW and Against Plaintiff

This action came on for trial before a court and a jury, Honorable Rudi M. Brewster, District Court Judge, presiding, and the court having instructed the jury to find a special verdict, and the jury having found such verdict IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action against defendant International Brotherhood of Electrical Workers be dismissed on the merits, and that defendant International Brotherhood of Electrical Workers recover of the plaintiff its costs of action.

IT IS SO ORDERED.

FILED: SEP 11 1991 Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Judgment on Local Union Defendants' Motions for Directed Verdict

The above-captioned matter came on for a jury trial before this Court on July 16, 1991. The matter was bifurcated for trial into two separate phases. during the first phase of trial herein, the court took testimony and evidence upon Plaintiff's duty of fair representation/breach of contract claims against Defendants IBEW Local 569 ("Local 569") and Fischbach & Moore, Inc. ("F&M") which were brought under Section 301 of the Labor Management Relations Act ("LMRA"; 29 U.S.C. § 185). On the first phase of the trial, the jury returned a verdict in favor of Local 569 as to the breach of the duty of fair representation issue and, as a result thereof, the breach of contract claim against F&M was not reached by the Court which resulted in the dismissal of F&M as a defendant in these proceedings.

The second phase of trial began on July 25, 1991. This portion of the trial centered on Plaintiff's allegations, as set forth in his Third Amended Complaint, that Local 569, the individual Defendants, and International Broth. of Electrical Workers ("IBEW") either breached their duty of fair representation towards Plaintiff as implied by operation of § 301 of the Labor Management Relations Act ("LMRA"; 29 U.S.C. § 185), violated Plaintiff's rights under the Labor Management Reporting and Disclosure Act ("LMRDA"; 29 U.S.C. § 401 et seq.) that certain individual Defendants violated their fiduciary duties in their capacity as officers and/or employees of Local 569 under § 501 of the LMRDA (29 U.S.C. § 501) and that certain individual Defendants had committed the common law torts of assault and intentional infliction of emotional distress upon Plaintiff.

After taking testimony and evidence with respect to Plaintiff's claims against Local 569, the individual defendants and the IBEW, all parties rested their case on August 16, 1991.

Upon the close of evidence, Local 569 and the Local individual Defendants brought Motions for Directed Verdict in their favor as to all of Plaintiff's allegations.

After carefully considering the evidence, testimony and arguments from counsel, the court granted Local 569 and the individual defendants directed verdicts against Plaintiff on the following claims:

I. PLAINTIFF'S LMRA DUTY OF FAIR REPRESENTATION CLAIMS AGAINST LOCAL 569:

. . .

7. Plaintiff's claims that Local 569 breached its duty of fair representation by improperly implementing a collective bargaining agreement known as the Commercial Wiremen's Agreement.

8. Plaintiff's claims that Local 569 breached its duty of fair representation by conducting, in August 1988, an allegedly improper ratification vote on the 1988/1991 Inside Wiremen's Agreement.

II. PLAINTIFF'S CLAIMS ARISING UNDER THE LMRDA:

. . .

3. Plaintiff's claims that the individual Local Defendants violated and otherwise abridged his right to sue under the LMRDA (29 U.S.C. § 411(a)(3)).

. . .

With respect to the foregoing claims, it appears to the Court, after having considered all of the evidence in the case and the reasonable inferences flowing therefrom on the light most favorable to Plaintiff, that the evidence is insufficient as a matter of law to entitle Plaintiff to recover against Local 569 and the individual Local Union Defendants. Costs may be taxed by Local 569 and the Local Union Defendants against Plaintiff in the relationship they bear to the above-dismissed claims.

IT IS SO ORDERED.

FILED: SEP 19 1991 Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 87-0172-B

Findings of Fact and Conclusions of Law, Judgment on Court Trial and Judgment on Special Verdict - March 18, 1992

This case came on regularly for trial on July 16, 1991. Jury verdicts on bifurcated issues were returned on July 24, 1991 and August 22, 1991. Remaining non-jury issues were tried on January 28 and 29, 1992. Plaintiff appeared as his own attorney. Louis Levy, Esquire appeared for Defendant Local 569 and Terrence Yellig, Esquire appeared for Defendant IBEW.

On the first bifurcated jury trial against Local 569 IBEW only, the jury found in favor of defendant and against plaintiff on Count Six of plaintiff's First Cause of Action alleging Breach of the Duty of Fair Representation in connection with the Fischbach & Moore, Inc. to Corbin Dykes Company.

On the second bifurcated jury trial, immediately following the first verdict and before the same jury, the jury returned answers to special questions covering all remaining jury trial causes of action not previously removed by pre-trial Orders of the Court as follows:

We, the Jury in the above-entitled action, find on each of the questions submitted to us, as follows:

. . .

Has plaintiff proved by clear and convincing evidence that Local 569 violated plaintiff's Labor Management Reporting and Disclosure Act rights by intentionally re-submitting two by-law amendments to the union membership for vote, which had been proposed by plaintiff earlier, at a time when the plaintiff was suspended from attendance to Union membership meetings, and unable to speak in support of his proposed amendments?

Please answer "Yes" or "No."

Answer: Yes .

If you answered "No" to Question No. 13, do not answer Questions No. 14, No. 15, No. 16, or No. 17, but go directly to Question No. 18. If you answered Question No. 13 "Yes, please answer Question No. 14.

Question No. 14.

Do you find nominal damages in favor of Plaintiff as a legal result of Local 569's acts in Question No. 13?

Please answer "Yes" or "No."

Answer: Yes.

If you answered "No" to Question NO. 14, do not answer Question No. 15, No. 16 or No. 17, but go directly to Question No. 18. If you answered "Yes" to Question No. 14, please answer Question No. 15.

Question No. 15.

What amount of nominal damages do you find in plaintiff's favor against Local 569 as a legal result of its acts of Question No. 14?

Answer: $ 500.00.

Question No. 16.

Has plaintiff proved by clear and convincing evidence that the Local 569's conduct described in Question No. 13 was motivated by ill will or a purpose to harm plaintiff's interest?

Please answer "Yes" or "No."

Answer: Yes.

If you answered Question No. 16 "No," do not answer Question No. 17, but go directly to Question No. 18. If you answered Question No. 16 "Yes" please answer Question No. 17.

Question No. 17.

What amount of punitive damages has plaintiff proved by clear and convincing evidence against Local 569?

Answer: $ 2,000.00.

. . .

Question No. 33.

Has plaintiff proved by clear and convincing evidence that any or all of the defendants violated their fiduciary duties toward Local 569 by overseeing, allowing, or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569?

Please answer "Yes" or "No."

Answer: Yes.

DATED: 8/22/91

Earlene Abeson
FOREPERSON

With respect to the non-jury trial of the three remaining equitable issues, the Court now enters the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

. . .

NOW, THEREFORE, based on the Jury's Special Verdicts and the Findings of Fact and Conclusions of Law by the Court, and the Court being fully advised in the premises, hereby enters the following:

JUDGMENT

. . .

3. Additionally, plaintiff is awarded $500 plus costs of suit against Local 569, IBEW on his claim for damages based upon re-submitting by-law amendments earlier proposed by plaintiff to the union membership at a time when the plaintiff was suspended from attendance at union membership meetings.

4. In addition, plaintiff is awarded $2,000 as punitive damages against Local 569, IBEW based upon the same claim.

. . .

8. Additionally, the Court enters Declaratory Judgment that defendants violated their fiduciary duties toward Local 569, IBEW by overseeing, allowing, or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569. Court costs of suit are awarded to plaintiff on this claim.

. . .

Declaratory judgment shall be entered under the Fourth Cause of action against defendants Paul Blackwood, Wayne Lovin, Jim Westfall, Tom Pridemore, Joe Heisler, Dick Smith, Terry Godshalk, Keith Widdop, George England, Kris Hartnett, Don Withem, Steve Workman, Mike Reilly, John Simpson, Ray Altmeyer, Richard White, Jim Brandon, Sharon Hahn, Bob Riel, Jim Aylsworth and Charles Wilder, declaring that said defendants violated their fiduciary duties toward Local 569, IBEW, by overseeing, allowing or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569, IBEW.

Costs of suit are awarded to plaintiff on this claim.

FILED: MAR 18 1992 Rudi M. Brewster
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Transcript of Motion Hearing Before
The Honorable Rudi M. Brewster
United States District Judge
SAN DIEGO, CALIFORNIA, MONDAY, JUNE 29, 1992
(Call to order of the Court.)

MR. MOORE: Good morning, your Honor, Lawrence Moore appearing for himself.

MR. BROWN: Good morning, your Honor, Craig Brown of Hillyer & Irwin appearing on behalf of Fishback & Moore.

THE COURT: Good morning, Counsel. Just to bring us up to date, this motion is a revisited motion brought by Fishback & Moore who earlier applied to this Court for attorneys' fees and the Court granted Fishback & Moore court costs as part of the judgment for the Defendant. Then the -- Fishback & Moore brought a motion for attorneys' fees pursuant to the inside agreement, Section 1.06. The court ruled at that time that the jurisdiction for that request for fees lay within the procedure set forth in the inside agreement, because Section 1.06 -- the section which provides for the fees also provides for the procedure for obtaining the fees, and so the Court referred the parties to the inside agreement and denied without prejudice the request for attorneys' fees.

Fishback & Moore now moves the Court to revisit this motion on the grounds that Fishback & Moore alleges that they followed the order of the Court and they proceeded within Section 1.06 and it was scheduled for a hearing on their request for attorneys' fees, but then Mr. Moore refused to participate in that proceeding and he absented himself from the hearing, therefore there was no hearing, and so apparently, as I understand it, it's gone nowhere. There hasn't been any action taken pursuant to this Court's order.

The Court has revisited the matter, has re-read Section 1.06 and it appears to the Court that Section 1.06 does apply. Mr. Moore's position is that is's not an impartial arbitration because

Mr. Moore contends that the Union would not fairly represent his position in opposition to that request for fees, but the matter is not an arbitration matter. Section 1.06 doesn't even use the term arbitration. It just says that the procedure for fees shall be put before the Labor Management Committee or the Appeals Committee or the CIR under the provisions of this agreement, whichever is applicable.

I infer from that that in the first instance the local Labor Management Committee would hear the matter and would decide it and if there is an aggrieved party, that that aggrieved party would have the opportunity to appeal it up to the administrative channel, as high as the CIR in Washington, D.C. and get a ruling from the CIR. And that's the procedure which 1.06 provides for if there is an aggrieved party from the CIR.

Then I think that the procedure would be to look at the inside agreement to find whether or not that decision on CIR is final or not, or whether it's appealable. Is there another section agreement that answers that question?

MR. BROWN: I'm sorry, the question that --

THE COURT: As to whether the CIR's decision is final and binding on the parties, or whether it's appealable. Is there any section in the inside agreement that covers that?

MR. BROWN: I believe it's 1.06. I'm not aware of another -- another section, but I believe there is something in 1.06 about the decision being final. I'll have to look.

THE COURT: Well, do you have it in front of you? Mr. Moore, what's your answer to that?

MR. MOORE: Nothing in the agreement on that, your Honor.

THE COURT: Isn't there another section in the agreement, Section 4 or someplace, which says that disputes are resolved with a final and binding --

MR. MOORE: That's at the end of Section 1, that's correct, your Honor.

THE COURT: What section is that?

MR. MOORE: Section 1. That's 1 point -- well, I think it refers to grievances -- to grievances and contract negotiations that are unable to be resolved in local negotiations.

THE COURT: 1.06 is the end of Section 1, that's the last one in Section 1.

MR. BROWN: 1.06 was not in the inside agreement when the case was filed, your Honor. It was filed afterwards under a non-ratified contract which was also an issue in the case, so I'm not really familiar with that particular section.

MR. MOORE: Your Honor, I had a broader cause of action in the case that said that that entire agreement was not valid because it wasn't approved by the membership as required by the IBEW constitution and the Union defendants filed a motion for summary judgment based on that and you denied it, saying that the constitution was explicit that the members had to vote on and approve the agreements or they weren't valid, but later on --

THE COURT: Are we talking about the agreement that went into effect on August 23, 1988?

MR. MOORE: Right.

THE COURT: What about its predecessor agreement?

MR. MOORE: It wasn't in there.

THE COURT: 1.06 wasn't in there?

MR. MOORE: No.

MR. BROWN: 1.06 was in there at the time of the lawsuit, your Honor. The third paragraph in Section 1.06 states the final decision of the grievance resolution bodies as set forth in Section 1.04, 1.05 and Article 4 hereof shall be final and binding upon all parties hereto, including employees, employed by employers pursuant to the provisions of this agreement.

MR. MOORE: On the contrary, your Honor, I submitted a declaration when they originally brought this motion that showed that the provision was not in the agreement. Not in '87 or '86 or any other agreement. It was brought in retroactively.

MR. BROWN: I'm quoting from the agreement that was introduced at the trial by Plaintiff, and was relied upon by the Plaintiff throughout the trial.

THE COURT: What about that? You used -- you relied on Plaintiff's 2 -- that's this agreement, was it not?

MR. MOORE: I don't remember which version we had, your Honor. I think we had several versions at the trial -- all of the versions were disputes.

THE COURT: Do we have the other -- the little contracts -- we had those exhibits -- they're probably in our papers. Do you think you could find those? They're about like this.

(Pause to confer.)

THE COURT: We had our own -- we had our own working copies in our chambers. We don't have them any more?

(Pause to confer.)

MR. BROWN: In filing this motion, your Honor, I pulled this from my trial notebook in that case -- I pulled it from that exhibit and made a copy of it and put it in my declaration.

THE COURT: Well, this -- it says --

MR. MOORE: On the contrary, your Honor, I believe I went back to 1984 with the inside agreements because the transferring of employees that I allege was a breach of contract started -- I think -- in 1984. They did the transferring that I claim was a breach of contract between 1984 and 1988.

MR. BROWN: That issue was brought up, but we -- in motions in limine we excluded the time and focused on a specific amount of time for purposes of the trial.

THE COURT: Well, we have an issue right now. The issue right now is which inside agreement was the operative agreement. We have to start by looking at that agreement. Now, where is that agreement?

MR. MOORE: The particular portion of that agreement that's relevant here this morning was attached to my declaration which was filed in opposition to their original motion.

THE COURT: Was it filed in this one?

MR. MOORE: No, I incorporated it by reference, your Honor.

THE COURT: Well, all I've got is what's piled here. Now, my clerk tells me that we don't any longer have those --

(Pause.)

THE COURT: Well, Counsel, the exhibits which were admitted at trial are always the responsibility of the attorneys, and the parties who filed them have the responsibility to keep them, so perhaps Mr. Moore you have Plaintiff's 2 probably, at home.

MR. MOORE: No, I don't, but I have all of the agreements at home, your Honor, and I inadvertently -- I carry those things with me, that big packet -- but I don't have them with me, for the first time.

THE COURT: Well, okay, then --

MR. MOORE: I do have the excerpts from the agreement, before the 1988 agreement, attached to my declaration which I submitted originally.

THE COURT: With these papers?

MR. MOORE: No, I attached it to the original motion back a few months ago. I attached the two agreements --

THE COURT: Do we still have those papers? The request by F & M for a motion for fees which they filed about six or eight months ago?

(Pause to confer.)

MR. BROWN: I have all my copies with me.

THE COURT: Well, do you have the affidavit he's talking about?

MR. BROWN: Well, I'm sorry -- Mr. Moore's papers?

THE COURT: He filed an affidavit and as exhibits to his affidavit he says he attached portions of the inside agreement which were in effect during that trial. He says he's got attachments with those attached to them.

MR. BROWN: I have Mr. Moore's opposition to my initial motion for fees --

MR. MOORE: Isn't there a supporting declaration?

THE COURT: Is there a supporting declaration?

MR. BROWN: Yes, there is.

THE COURT: And in that declaration does he include excerpts from the inside agreement?

MR. BROWN: He includes excerpts from -- it looks like the 1982 to 1984 agreement --

THE COURT: Okay --

MR. BROWN: -- which is inapplicable because that's not the agreement that was introduced at trial.

MR. MOORE: Yes, I have it -- have the declaration here, your Honor, if you'd like to see it.

THE COURT: You say that's not the inside agreement that was introduced at trial?

MR. BROWN: No, my declaration is that the inside agreement that we used at trial was the one that was effective August 23, 1988 and in my papers I have a section on the applicability of that -- that inside agreement, and the fact that --

the complaint was amended September 29, '88 which is during the effective part of that agreement. The cause of action that we litigated at the time of -- at the time of the trial was the transfer, and the transferring cause of action was amended in the complaint on September 29, 1988, and the agreement that was effective at that time was the August 23, 1988 agreement.

THE COURT: All right, the merits of his dispute would be determined under the inside agreement that was effective at an earlier date. Do you agree with that? The merits of his dispute on the merits. In other words, the transferring of the employees -- if it occurred before '88 you would look at the inside agreement that was in force when the transferring occurred.

MR. BROWN: Yes, on the merits of the suit, but --

THE COURT: Yeah, that's what I'm asking about. Now, as to that was there an exhibit on that, on the merits of the exhibit -- of the dispute?

MR. BROWN: At trial, no. At trial we all relied on Exhibit 2 which was the '88 agreement, throughout the trial and that's the only agreement that was introduced. No others were introduced and that was considered the operative agreement and the one that we all depended on throughout the trial.

THE COURT: Well, let's assume that -- let's assume that it was introduced into evidence and it was depended on for certain purposes by everybody. If in fact that agreement was not properly ratified by the Union, then the fact that it was used by the parties at a trial in this Court for certain purposes, would that estop the Plaintiff or anybody else from urging that this unratified agreement not be used as a lynch pin to base an order or a judgment for money?

MR. BROWN: Yes. It's using the inside agreements as a smorgasbord. At trial you use one that says what you wanted -- and then later when there's a fee motion you use another and -

THE COURT: Well, okay, but if the agreement wasn't ratified, and if the Plaintiff either didn't know it or did know it --

MR. BROWN: We're assuming that it wasn't ratified. We haven't --

THE COURT: Assuming that it wasn't, and if the defendants didn't raise any objection to the exhibit on the grounds that it wasn't valid, then -- why could not the defendant urge -- why could not the plaintiff now urge that -- for purposes of your plaintiff in -- that you can't rely on the agreement which wasn't ratified. And the fact that he may have relied on it for some purposes, he didn't rely on it for this purpose -- he wasn't using it for Section 1.06. If he did use it, he wasn't using it for 1.06.

MR. BROWN: Well, you're going to allow him to use four different at four different times for different issues -- one issue suits his needs, so he'll use the contract that says what he wants in that issue?

THE COURT: Well, yeah -- here's my point. Here's my point. Let's assume that this agreement is ratified. Let's assume it is. It provides for attorneys' fees --

MR. MOORE: That's right.

THE COURT: -- and if the suit or the claim is filed by Mr. Moore after August 23, 1988 even though he relies on sections of an earlier agreement for the merits of his claim, if he files after August 23 and wins, he's entitled to recover his fees under this agreement because the agreement was in place when he filed his action. So it's -- he could recover his fees.

MR. BROWN: Yes, but --

THE COURT: Just like you could recover your fees. Even though this agreement wouldn't resolve the dispute on the merits, because it was a later agreement, the disputed merits requires adjudicating an earlier agreement. This agreement, if it's ratified, would still be prospectively applicable to the claim --

MR. MOORE: That's right.

THE COURT: -- and therefore if Mr. Moore won or lost the attorneys' fees and costs under -- this new agreement would apply --

MR. MOORE: that's right.

THE COURT: -- even though the merits of the dispute required an earlier inside agreement. Now, so that's why I think whether or not it's ratified is important. If this agreement was ratified, then under the terms of this agreement, F & M would be entitled to costs and fees incurred after the date of this agreement, but not retroactively, only prospectively. But if the agreement is not ratified, then F & M cannot rely on this agreement for any purpose. So I think whether it's ratified or not is important, isn't it?

MR. BROWN: I agree.

THE COURT: Well, was it ratified or not?

MR. BROWN: I assume it was ratified because we all depended on it at trial. I don't know why we would use an unratified agreement, but I have nothing else -- I haven't briefed that issue, I don't know whether or not --

THE COURT: I think -- you're not the moving party, you have the burden, you're the one that wants the fees, you have the burden to show the Court that you're entitled to them. He's raising the issue that the agreement was not ratified. You have the burden to show me that it's ratified, because you're the moving party here.

MR. BROWN: Well, I -- I can't do that for you today, I have no idea whether the -- I have never heard of this issue before and I find it -- I find it absurd that we would have depended on an unratified agreement by both Plaintiff and Defendant in the trial, throughout the --

THE COURT: Mr. Brown, you're going to see a lot more absurd things than that before you get through with your happy career practicing law. I mean, maybe everybody assumed it was ratified. I mean I certainly did. I mean -- this point this morning that Mr. Moore is raising catches me as a blindsided argument. I wasn't aware that there was a contention that this thing wasn't ratified. But nevertheless here it is.

MR. BROWN: Okay, well --

THE COURT: I'm as surprised as you, but setting aside our surprise, it doesn't surprise me that we could all be laboring under a misapprehension that it was ratified. Maybe it's something that everybody, including Mr. Moore, thought was a fact. Maybe has done some research and has discovered that it isn't a fact, but I -- even if he knew it wasn't ratified -- even if he knew it wasn't ratified, I know this, it wasn't introduced during the trial for the purposes of invoking Section 1.06.

MR. MOORE: That's correct, your Honor and --

THE COURT: If it was used, it was used for some other section of the agreement and my guess is -- I'm just guessing, not even assuming -- but I'm guessing that the sections that were invoked are sections which you will find in the antecedent inside agreements.

MR. MOORE: That's correct, your Honor there --

THE COURT: So this agreement is going to be the same as the prior agreements with respect to the sections on which Mr. Moore is relying.

MR. BROWN: In fact it was relied on for the purposes of 1.06, and that's --

THE COURT: That wasn't an issue before the jury -- on 1.06.

MR. BROWN: That was the exact issue, whether or not the grievance should go to the CIR and whether or not that issue was decided correctly under 1.06. 1.06 lays out the process by which you appeal and you go from the Labor Management Committee to the CIR and that issue was before the jury, whether or not that was done correctly, and we talked about 1.06, we cited 1.06 and this is the agreement that we used.

THE COURT: Well, everybody acted as if it were ratified and maybe it was, but all I'm saying now is if we all made a mutual mistake of fact, and we thought we were dealing with one that was ratified and it wasn't, sooner or later we have to come to -- with reality, don't we? And now it's been raised as an issue, now we have to answer it. Was it or wasn't it ratified?

MR. BROWN: I can't answer that for you today, your Honor.

THE COURT: Well, I -- I'll give you time --

MR. BROWN: We were both blindsided --

THE COURT: I'll give you time to find out.

MR. BROWN: Is your decision today then that if it was ratified and was in effect at the time of --

THE COURT: Here's what I wanted to do --

MR. BROWN: Okay.

THE COURT: Let me tell you what I wanted to do today --

MR. BROWN: Okay.

THE COURT: -- assuming that this thing is ratified, assuming that -- what I wanted to do today was to order the parties back to the Labor Management Committee pursuant to 1.06 and follow the procedures of the inside agreement because that's what the agreement says. I'm not going to rewrite the agreement, and if the Plaintiff refuses to participate under the agreement, than -- under an order of this Court to do so -- then if he does refuse, then come on back to this Court and this Court will be forced to handle the issue, but I'll say to both of you that this agreement provides that attorneys' fees and costs shall be paid --

MR. BROWN: Well, I --

THE COURT: -- shall be paid. It doesn't even give me any discretion on the matter.

MR. MOORE: That's fine, your Honor, but I'm not a party before the Labor Management Committee. My exclusive bargaining representative is the party before the Labor Management committee and that's why they don't have any jurisdiction over me. The law is very clear on that.

THE COURT: Well, it says --

MR. MOORE: If these people have a --

THE COURT: You don't have to be a party to the agreement. 1.06 says that -- it says either -- either a party to the agreement or any employee employed under the provisions of this agreement has standing to get these fees paid. So you have --

MR. MOORE: That's correct, your Honor, but I have an exclusive bargaining representative under that agreement -- under the LMRA they cannot come after me, they have to go after my exclusive bargaining representative.

THE COURT: It doesn't say that. It says should any party or any employee employed subject to the provisions of this section and agreement, engage in or initiate any legal proceedings -- which you did -- or who cause any action to be brought before any court -- which you did -- who is unsuccessful in such endeavor shall pay the reasonable costs and attorneys' fees of the party prevailing in such action or litigation. So it doesn't say your bargaining representative, Mr. Moore, it says the employee employed under the provisions of this agreement.

MR. MOORE: That's correct, your Honor but --

THE COURT: That's you.

MR. MOORE: -- but again under the LMRA I am not a party for purposes of Labor Management Committee or grievance decisions. They have to go after my exclusive bargaining representative. The Union can't have all the benefits of being my exclusive bargaining representative --

THE COURT: Your suit against F & M was a 301 action --

MR. MOORE: That's correct.

THE COURT: -- not LMRA.

MR. MOORE: No, it was LMRA. It was LMRA 301, that is LMRA.

THE COURT: Well, I thought you were speaking of LMRDA?

MR. MOORE: No, no.

THE COURT: Okay, well under 301 -- you were the Plaintiff under 301 and you had standing to accuse the employer of a breach of a collective bargaining agreement.

MR. MOORE: That's right.

THE COURT: And that's what you did.

MR. MOORE: No, the LMRA -- part of the reason that the LMRA was passed, was to make sure that Union members are not liable for any decisions under the LMRA. That's part of the LMRA. The -- I quoted from Congress' -- I did my reply -- I quoted the section --

THE COURT: Well, how do you handle 1.06? If you fall within the meaning of 1.06 and that is an inside agreement, it's a collective bargaining agreement and you -- and it specifically identifies you -- everything except by name.

MR. MOORE: Right.

THE COURT: And it says if you press -- file an action or a court action and you lose, you shall be liable for costs and fees. Now, even if the Taft-Hartley Act doesn't say that you're liable, what about this inside agreement?

MR. MOORE: The inside agreement is -- is an agreement under the LMRA. It's an LMRA collective bargaining agreement under Section 301, and the Union is my exclusive bargaining agent under the --

THE COURT: In other words, I -- you would have to show me something in the LMRA which says that this agreement is illegal.

MR. MOORE: Correct, your Honor, and in my opposition --

THE COURT: Is there -- there's no --

MR. MOORE: -- my opposition filed on June 15th on page 6 I explained that, and cite from the Congressional record the purpose of the LMRA and the old -- the case that we've discussed before here, the Danbury Hatters case, Lawlor v. Low where such agreement -- where such judgments were brought in against Union members and they lost their homes and things, and Congress specifically passed the LMRA to make sure that would never happen again. It's right in my opposition on page 6 there, it's a very -- it's just one paragraph, you can look at it, your Honor.

THE COURT: Well, are you saying that the inside agreement violates the LMRA?

MR. MOORE: No, the inside agreement is -- the inside agreement says that if you get a judgment against the party to the agreement and it's not one of the employers, then the Union is responsible.

THE COURT: It doesn't say that. I can't read that in the inside agreement. Section 1.06 clearly says that if -- that parties to the agreement or an employee employed under the provisions of this agreement -- if any of those three people file an action and lost they shall be responsible. It doesn't say the Union will be responsible for the employee's fees -- for the employee's obligations -- it doesn't say that.

Now, the only way that I could get around this agreement is if there is some law to the effect that that inside agreement violates the Taft-Hartley Act and therefore can't be enforced, because on the terms of this agreement if it's ratified, the agreement clearly gives F & M the entitlement to their costs and fees.

Now, if that agreement is valid -- if it was ratified and if it's valid then judgment is going to be entered. If this Court has to enter it, it's going to be entered against Plaintiff. However, if the agreement violates the Taft-Hartley Act, that's the way -- maybe that's a way out. But if it doesn't violate the Taft-Hartley Act then I'm bound by the agreement, aren't I?

MR. MOORE: No, I don't think you are.

THE COURT: Well, how can I get around the agreement?

MR. MOORE: Well, how can an agreement that a bunch of guys can get together -- I mean if you haven't seen enough of this scam that this Union and the Employers' Association is running with these agreements by now, I'm going to go hoarse here and it's not going to make any difference. I'm asking you to look at page 6 of my opposition here -- there's a one-paragraph --

MR. BROWN: Your Honor --

MR. MOORE: -- all I did was one paragraph to the point.

MR. BROWN: It's my understanding that Mr. Moore's representation to the court is that this agreement is not ratified. If that's the --

THE COURT: That's what he's saying.

MR. BROWN: If that's the case, I --

MR. MOORE: No, no, what I'm saying --

MR. BROWN: -- as to why he's arguing this point --

MR. MOORE: That's not what I'm saying. He's mischaracterizing what I'm saying.

What I'm saying is that that cause of action in the complaint that said that none of these agreements were properly ratified -- there's been no agreement ratified at that Local Union since 1986, properly, and I had a cause of action in there, and they can't be -- the Union Defendants opposed it, and you said, "No, the constitution is very clear, they have to vote on it, it has to be legal."

But later on, you changed your mind and didn't give it to the jury. So --

MR. BROWN: It sounds like he ruled on it.

MR. MOORE: -- the question is up in the air here, but that -- that is not the --

THE COURT: But you are claiming that the agreement was not ratified.

MR. MOORE: That's right.

THE COURT: Okay, that's what he said.

MR. BROWN: If that's the case I don't understand why --

THE COURT: But now he's got another argument -

MR. BROWN: -- why the colloquy about --

THE COURT: -- now he's got another argument, Mr. Brown. He's saying that not only wasn't it ratified, but he's saying that if it provides for a Labor Union member to pay these costs and fees, it violates the Taft-Hartley Act, and it can't -- it can't be followed by the Court if it violates the Taft-Hartley Act.

MR. MOORE: No, it says the Union's liable, your Honor.

THE COURT: Well, where does it say that? The agreement doesn't say that.

MR. MOORE: Section 301 of the LMRA says that, but you can read -- now, please read the one paragraph -- it's Section C on page 6 of my opposition.

MR. BROWN: Page 6 of the opposition cites the Lawlor Act which is inapplicable in the facts at hand --

THE COURT: Page 6 -- Page 6 of Plaintiff's memorandum of points and authorities in opposition to defendant Fishback & Moore's motion for attorneys' fees, page 6.

MR. MOORE: Section C.

THE COURT: I don't even see a Subsection C in here.

MR. MOORE: Have you got the one that I filed on June 15th or is that the one that was filed in opposition --

THE COURT: January 6.

MR. MOORE: No, that's the last motion. The one I filed just a couple of weeks ago.

(Pause.)

MR. MOORE: I don't cite Lawlor v. Low, I cite the Congressional Record. I cite Lawlor v. Low as the cause of the Congressional Record, the excerpt from the Congressional Record, which prompted the Senator's comment.

(Pause.)

MR. BROWN: Your Honor, I'm fairly familiar with the ratification process so maybe I can clear this up with --

THE COURT: Okay, I've got the June 15th opposition -- let me look at page 6.

Page 6, paragraph C. "Plaintiff is not individually liable for any actions." Is that how you read the contract?

THE COURT: Senator Ball's excerpt says, "Where a Union sues and gets sued that the liability for damages will lie against Union assets only," and that will prevent a repetition of the Danny Hatters -- Danbury Hatters case in which Union members lost their homes.

MR. MOORE: The Danbury Hatters case is Lawlor v. Low, the case cited above.

MR. BROWN: The case at hand is the Plaintiff has sued his Union and his employer. It's a different situation.

THE COURT: Plaintiff sued his Union and his employer.

MR. BROWN: Here.

THE COURT: Oh, here? Well, what happened in Lawlor v. Low?

MR. BROWN: In Lawlor v. Low, the employer sued the Union and the Union member.

THE COURT: Oh.

MR. BROWN: And the case is about --

MR. MOORE: For an illegal boycott -- for an illegal boycott, and --

THE COURT: Well, I can understand that.

MR. MOORE: And the Court said --

THE COURT: That doesn't help -- that doesn't help me at all.

MR. MOORE: The court said you can't sue an individual Union member.

THE COURT: Well, no -- you didn't get sued, Mr. Moore.

MR. MOORE: And you can't get a judgment against --

THE COURT: But you didn't get sued. You sued.

MR. MOORE: Right.

THE COURT: You were the Plaintiff.

MR. MOORE: Right.

THE COURT: Section 1.06 says that if that -- if the employee employed pursuant to provisions of this agreement brings an action and is unsuccessful, then the employee employed shall pay costs and attorneys' fees to the employer.

Now, if the agreement was ratified, then the next question would be is there some other reason not to follow the agreement? I can think one reason might be if the agreement violates Section 301 or any other section of Federal law.

MR. BROWN: As far as ratification is concerned I am unclear as to what it is exactly Mr. Moore's objection is, as far as ratification. If the Union members didn't ratify or -- I have a copy that's signed by the president, has a stamped approved symbol on it, and I'm not sure if that's ratification or if there is another election that needs to take place --

THE COURT: On the agreement itself?

MR. BROWN: Yes.

MR. MOORE: He doesn't -- I'm aware of all -- I know what's going on there. We had it before you --

MR. BROWN: It's been ratified.

MR. MOORE: This is the situation where they had the mail-in ballot which said the International Union imposed a new rule for a mail-in ballot ratification for the first time in the Local Union's history, and they had a vote and all of the employers and their superintendents and so on came down, and the vote -- I challenged the vote and subpoenaed the ballots and they destroyed them all and I filed a motion for contempt against them for destroying all of the ballots, and that's basically where it is.

MR. BROWN: This --

THE COURT: Well, was there ever any judgment by any court saying that that agreement was not properly ratified?

MR. MOORE: No.

MR. BROWN: There was -- according to Mr. Moore there was a decision by you that it was ratified.

MR. MOORE: It was a decision by you that it was not properly ratified under summary -- you refused to grant them summary judgment on that basis, that it was properly ratified because of the --

THE COURT: I thought you said I wouldn't let the issue got to the jury.

MR. MOORE: -- then later you said, "No, I'm not giving that to the jury," right.

THE COURT: So I must have said it wasn't ratified? Well, look, I would suggest this, Mr. Brown -- contact counsel for the Union and get them to give you some evidence of ratification and file it with a declaration.

MR. BROWN: Okay.

THE COURT: I'll give you another hearing on your motion.

MR. BROWN: I have a copy with me that has a stamped approval on it. Can I submit that at this time?

THE COURT: Well --

MR. BROWN: It's signed by both the president and business manager of the Local, and it's stamped approval International Brotherhood.

THE COURT: What date?

MR. BROWN: September 14, 1988.

THE COURT: Let me see it. Have you seen this, Mr. Moore?

MR. BROWN: I just showed it to him.

MR. MOORE: I've seen all of the agreements, your Honor. I know what's on there.

THE COURT: I mean these ratifications.

MR. MOORE: The ratification --

THE COURT: The sealing and signing --

MR. MOORE: We've got documents in there two feet high on that ratification, your Honor, in --

THE COURT: Altmeyer (phonetic), he's the president of the IBEW?

MR. MOORE: No, he's the president of the Local Union.

THE COURT: Local?

MR. MOORE: Right.

THE COURT: Jack -- is it Swart (phonetic) -- the employers?

MR. MOORE: Jack Swart -- he's an employer, right.

MR. BROWN: The two signatures on the top are the employers.

MR. MOORE: Signing on behalf of Nica (phonetic).

THE COURT: Well, was it approved by the International? Does it have to be?

MR. MOORE: Yes.

MR. BROWN: Apparently that stamp says International Brotherhood on it.

MR. MOORE: Yes, according to the IBEW constitution the International president ratifies everything -- has to ratify everything.

THE COURT: Well, that stamp is pretty hard to read -- I can't even read that. Oh, there it says "International" -- okay. I can see the name International, it says "approved International, September 14, 1988." There's somebody by the name of J.J. something?

MR. MOORE: J.J. Barry.

THE COURT: Yeah, that's probably what it is.

MR. BROWN: J.J. Barry is the president of the United --

THE COURT: Well, look, gentlemen, let's -- let's grab this -- in view of that, I'm going to make a finding that the agreement was ratified and under the agreement it has a procedure in 1.06 for determining these fees.

I'm going to once again -- I'm going to order the parties to go back and have this fee dispute settled pursuant to Section 1.06. And if either party refuses to engage in that, then the -- then it seems to the Court that the hearing should go forward by default.

In other words, they shouldn't just not do anything. If Mr. Moore doesn't show or you don't show at a properly noticed time and place to have this hearing, the hearing should go forward anyway, and they should make their findings and then let the aggrieved party appeal it.

But I'm not going to -- I'm not going to be the Labor Management Committee, and that's what you're asking me to be. I don't know why they wouldn't go forward with the hearing -- you say in your papers that Mr. Moore wouldn't show up and wouldn't play.

Well, if you go to a basketball tournament properly scheduled and the team doesn't show and they say, "We're not going to play today," then the team wins by default.

MR. BROWN: I understand --

THE COURT: And you go on to the next level

MR. BROWN: -- if I were the Labor Management Committee --

THE COURT: You go on to the next level of the contest, so -- but you don't abort the contest -- that's what you've done here. You went out there and Mr. Moore didn't show so they just aborted it.

MR. MOORE: Your Honor, that's the -- the analogy depends on a level playing field scenario and we don't have that here, and if that's all that's holding you up, I can tell you right now that I'm never going to submit to the jurisdiction of that committee and we're wasting our time -- if that's all that's holding your decision up, there's no -- I'm not going into that Labor Management Committee hearing in a million years.

MR. BROWN: Well, your Honor, I appreciate that and I wish that had happened -- we had this discussion the first time around, but if that's the case --

THE COURT: All right, then I'm going to find that the -- F & M then can properly bring its motion here because they can't get enforcement of their rights of the agreement -- it's a proper supplemental motion. The Court has jurisdiction because of the case that it tried and enter the judgment F & M --

MR. MOORE: Just a second, now, your Honor, hold it, now. They've got no decision from anybody.

First of all, they've got to get some kind of a decision from the Labor Management Committee in default. That's fine, but you can't -- we can't just jump over that. They're going to have to go back and get the default, nonetheless.

THE COURT: I thought you didn't want -- I started out doing that.

MR. MOORE: Oh, I'm sorry -- right, but I --

THE COURT: I started out doing that and you stopped me.

MR. MOORE: Well, that's okay, your Honor, do -- it's okay, I just -- just a mere caution -- you know, we're -- it's all going to appeal so I'm merely pointing out that --

THE COURT: All right, then I'll stick to what I started to say. Go back and get a hearing and if Mr. Moore doesn't attend, get your ruling from the Labor Management Committee -- don't let them abort it.

MR. BROWN: If I have a clear indication that I do have today that Mr. Moore is not going to show up, can we proceed forward with --

THE COURT: No. What you should do then is go ahead and you'll get your order or an order from your Labor Management Committee -- if there is no appeal of it by Mr. Moore it becomes final, and if he won't -- if he won't pay -- or you know -- then you can come into Court and you can sue him on the order pursuant to your suing him on the -- it's a contractual lawsuit then, and you can sue him on the agreement.

MR. BROWN: Well, is that decision based on your understanding that Mr. Moore will not appear and his statement today is that he will not appear --

THE COURT: I don't really care if he appears or not. I -- what I wanted to do with this case was to send you back and this time get a ruling -- don't let them abort. Get a ruling.

MR. BROWN: I'm --

MR. MOORE: They don't want to give him a ruling because they're going to be in court then. They know that, that's what's going on here. They're trying to get around --

MR. BROWN: Your Honor, that is absolutely true. I don't want to belabor the point but that is true. The Union --

THE COURT: I'm going to write it up. I tried to tell you four times what I'm going to do. I'll write it up, I'll prepare the order.

MR. BROWN: Thank you, your Honor.

THE COURT: Do you understand what I'm saying?

MR. BROWN: I do understand --

THE COURT: I'll write it up.

MR. MOORE: How about the lack of grounds for a motion for reconsideration here, your Honor? They shouldn't have been able to even bring this motion.

THE COURT: No, no, they've got grounds for reconsideration, but the Court's ruling will be in writing.

MR. BROWN: Thank you, your Honor.

THE COURT: Okay.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Adeline Carlson 7-21-92
Transcriber

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE MOORE,)
Plaintiff-Appellant,)
) CA No. 92-55517
v.)
) DC No. CV-87-172
LOCAL UNION 569 OF THE) -RMB(HRM)
INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS; PAUL)
BLACKWOOD; WAYNE LOVIN; JAMES) MEMORANDUM*
WESTFALL; TOM PRIDEMORE; JOE)
HEISLER; DICK SMITH; TERRY)
GODSHALK et al; INTERNATIONAL)
BROTHERHOOD OF ELECTRICAL)
WORKERS; J.J. BARRY; S.R.)
McCANN; RICHARD ROBBINS;)
ATKINSON MECHANICAL;)
FISCHBACH & MOORE, INC.,)
Defendants-Appellees.)

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted March 9, 1994
Pasadena, California

WALLACE, Chief Circuit Judge; FARRIS, and KLEINFELD, Circuit Judges:

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

A. Motion to Disqualify Counsel and Award of Attorneys' Fees

Moore brought a motion to disqualify Local 569's counsel from representing the individual defendants accused of violating their fiduciary duties under Section 501 of the LMRDA, 29 U.S.C. 501. Finding that Moore had not demonstrated a reasonable likelihood of success on his Section 501 claim, the district court denied Moore's motion and required him to pay the attorney's fees incurred by Local 569 in opposing the motion. Eventually, however, Moore did prevail on this claim. The district court may well have properly reconsidered its award of attorneys' fees if Moore had made the appropriate timely request. The record reflects that he did not. We find no error in the failure of the court to sua sponte revisit the issue. It was not error to make the award at the time that the court made it.

The district court acted within its discretion when it declined to order the individual defendants to reimburse Local 569 for the pension contributions and the cost of their defense. Union funds should not be used to defend officers against charges that they fraudulently deprived members of their rights or committed offenses that were "'seriously detrimental to the union and its membership.'" Kerr v. Shanks, 466 F.2d 1271, 1277, (9th Cir. 1972) (quoting Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962)), cert denied, 412 U.S. 918 (1973). Although Moore contended that some officers were taking a month's worth of benefits for only a week's worth of work, the district court did not find that the local officers acted fraudulently or that the members suffered a serious detriment. In fact, there was evidence that crediting the officers and staff employees with 48 hours a week of pension contributions put less money in their pension accounts than if they had been credited for the actual hours worked.

B. Claims Against Fischbach and Moore, Inc. and Local 569

Moore claimed that one of his employers, Fischbach and Moore, Inc., had violated the regional collective bargaining agreement by transferring some its employees to a subsidiary without first seeking referrals from Local 569's hiring hall. Moore also alleged that Local 569 breached its duty of fair representation under the LMRA by condoning Fischbach's practices. The district court properly bifurcated Moore's fair representation and breach of contract claims, and correctly dismissed the claim against Fischbach after the jury found for Local 569. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568-72 (1976) (holding that an employee who challenges the finality of an arbitration proceeding must first demonstrate that the union breached its duty of fair representation before proceeding against an employer for breach of a collective bargaining agreement). Moore was not prejudiced by the district court's exclusion of prejudicial and irrelevant evidence. The record supports the denial of Moore's motions for judgment NOV or a new trial.

C. Claims Against Atkinson Mechanical Contractors, Inc. and Local 569

Moore claimed that another contractor, Atkinson Mechanical Contractors, Inc., breached the regional collective bargaining agreement by wrongfully refusing to hire him. Moore also claimed that Local 569 violated its duty of fair representation by asking Atkinson to reject him.

Atkinson argues that Moore does not have standing to sue it for breaching the collective bargaining agreement. Because Moore was not employed by Atkinson at the time they rejected him, Atkinson contends he was neither a member of the bargaining unit covered by the agreement nor a third party beneficiary to the agreement. In Karo v. San Diego Symphony Orchestra Assoc., 762 F.2d 819, 821-22 (9th Cir. 1985), a union musician alleged that a symphony had breached a collective bargaining agreement by failing to hold auditions to fill an opening for a percussionist, and that the union breached its duty of fair representation by acquiescing. Because the agreement protected only employees of the symphony, we held that the plaintiff did not have standing to sue the union. Id. And because the terms of the agreement did not indicate the audition procedure was for the benefit of nonemployed union members, we further held that the plaintiff did not have standing as a third party beneficiary to sue the symphony. Id. See also, Sepulveda v. Pacific Maritime Assoc., 878 F.2d 1137, 139-41 (9th Cir.) (finding that longshoremen whom a union did not register as "best qualified" applicants did not have standing to sue either the union or the employer), cert. denied, 493 U.S. 1002 (1989).

Moore had standing to sue Local 569 and Atkinson for alleged improprieties in the hiring hall referral procedures. Pursuant to the regional collective bargaining agreement, Local 569, unlike the unions in Karo and Sepulveda, operates a hiring hall. In Breininger, the Supreme Court held that a district court had jurisdiction over an unemployed union member's suit which alleged the union breached its duty of fair representation in the administration of a hiring hall. 493 U.S. at 71, 73-85. The Breininger Court was not called upon to decide the issue of jurisdiction over a breach-of-contract suit against an employer. But in discussing Breininger's fair-representation claim, the Court repeatedly stated that it could have been accompanied by a breach-of-contract suit against the employer. Breininger, 493 U.S. at 80-85.

Nevertheless, the district court properly granted summary judgment for Atkinson on Moore's breach-of-contract claim. The agreement allowed an employer to reject an employee, provided the employer did not discriminate on the basis of union activity or race, sex, and other similar grounds. In rejecting Moore because he was litigious and disruptive, Atkinson did not breach the terms of the agreement. The record also supports the jury's verdict on Moore's fair-representation claim against Local 569. The district court properly denied Moore's motions for judgment NOV or a new trial.

D. Election Claims

Local 569 and the IBEW prohibited Moore from seeking election as a union officer and a delegate at the same time. The district court granted summary judgment dismissing Moore's claim that this policy violated his rights under the LMRDA. We dismiss Moore's claim for lack of subject-matter jurisdiction.

Federal courts lack jurisdiction over a claim that challenges the rules governing the eligibility of candidates for union office. Calhoon v. Harvey, 379 U.S. 134, 138-41 (1964); see also Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (stating that an appellate court always must consider subject-matter jurisdiction). There is an exception allowing for jurisdiction when the plaintiff claims that the union applied its election rules in a discriminatory manner. Kupau v. Yamamoto, 622 F.2d 449, 454 (9th Cir. 1980). There is no evidence that

Local 569 and the IBEW applied the eligibility rules unevenly.

Moore also claims that Local 569 and the IBEW committed other violations of the LMRDA during the 1986 election campaign. Moore had previously sought relief for these claims through an action filed with the Department of Labor. The Department and Local 569 settled these claims. Another district court approved the settlement. The record supports the court's conclusion that res judicata barred Moore from relitigating.

E. Fiduciary Duty Claims

Moore contends that the district court improperly limited his breach of fiduciary duties claim to the issue of Local 569's pension contributions on behalf of its officers and staff employees. The district court correctly determined that this was the only breach of fiduciary duty claim included in Moore's complaint that raised a triable issue of fact.

F. Personal Jurisdiction

The district court properly dismissed Moore's claims against J.J. Barry, the president of the IBEW, for lack of personal jurisdiction and correctly denied Moore's motion for default judgment against Barry. After Barry moved to dismiss for lack of personal jurisdiction, Moore bore the burden of coming forward with facts supporting personal jurisdiction. Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). Moore failed to establish that Barry could reasonably have anticipated "being haled into court" in California. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,297 (1980). "[A] corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." Forsyth v. Overmyer, 576 F.2d 779, 783-84 (9th Cir.) (citing Chem Lab Products, Inc. v. Stepanek, 554 F.2d 371 (9th Cir. 1977)), cert. denied, 439 U.S. 864 (1978). Nothing in the record indicates that Barry conducted any activity on his own behalf in California.

G. Other Claims Against the IBEW

The district court properly dismissed Moore's claims that the IBEW and its officers violated his rights under Title I or Section 609 of the LMRDA. Moore did not present evidence that the IBEW or its officers acted in bad faith, were guilty of fraud, or ratified any of the allegedly wrongful acts of Local 569 "'with full knowledge . . . of an overall scheme to suppress dissent in violation of the LMRDA.'" Moore v. Local Union 569, 989 F.2d 967, 973 (2d Cir. 1987)). The district court also properly concluded that Moore had not presented sufficient evidence to support his claim that the IBEW and its officers breached the IBEW constitution by, among other things, refusing to approve bylaw amendments proposed by Moore. Stelling, 587 F.2d at 1389 (holding that courts should defer to a union officer's interpretation of a union's constitution unless it is "patently unreasonable"). Furthermore, the district court appropriately denied Moore's motions for judgment NOV or a new trial regarding the jury's finding that the IBEW and its officers did not breach the IBEW Constitution in their handling of Moore's appeals from Local 569's disciplinary hearings. Id.; Landes Constr. Co., 833 F.2d at 1370-71, 72.

H. Jury Instructions

Claiming that the district court's jury instructions were flawed, Moore seeks the reversal of the district court's denial of his motions for judgment NOV and a new trial on a number of issues. Moore failed to object to the jury instructions at trial. Federal Rule of Civil Procedure 51 bars him from raising this issue for the first time in his appeal. Hammer v. Gross, 932 F.2d 842, 847 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 582 (1991).

I. District Court's Management of the Trial

The district court did not abuse its discretion by limiting the amount of time the parties had to present their cases. Moore did not suffer any prejudice as a result of the limitations. During the trial, the court generously extended the time available to Moore.

J. Building Trades Assessment Claim

Because Moore was never accorded class representative status as to his claims that challenged the increase in the building trades assessment owed by each member of Local 569, the district court correctly declined to order Local 569 to refund the increase to all the members of Local 569. In addition, the district court properly denied his request for a jury trial on this claim. Moore was seeking only declaratory and injunctive relief.

AFFIRMED.